IN THE

Supreme Court of the State of Michigan

On Appeal From The Michigan Court Of Appeals
Whitbeck, C.J., And Fitzgerald And Markey, JJ.

LINDA M. GILBERT,

Plaintiff-Appellee,

v.

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellant.

Supreme Court
Case No. 122457

Court of Appeals
Docket No. 227392

Circuit Court (Wayne County)
Case No. 94-409216-NH
The Honorable John A. Murphy

BRIEF ON APPEAL—APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Following a jury trial and verdict, the Wayne County Circuit Court entered final judgment in this matter on October 8, 1999. (3a-7a.)[1] On October 29, 1999, pursuant to MCR 2.610(A)(1), 2.611(B), and 2.612(C)(2), Defendant-Appellant DaimlerChrysler Corporation ("DaimlerChrysler") filed timely motions for (1) judgment notwithstanding the verdict; (2) a new trial and/or remittitur; and (3) an evidentiary hearing, relief from judgment, and a new trial based on fraud by counsel for Plaintiff-Appellee Linda Gilbert and expert witness Stephen Hnat. (119a-271a.) On May 1, 2000, the trial court denied DaimlerChrysler's post-trial motions. (8a-57a.)

On May 18, 2000, DaimlerChrysler filed a timely claim of appeal pursuant to MCR 7.203 and 7.204. On July 30, 2002, the Court of Appeals issued an unpublished per curiam opinion affirming the judgment. (58a-95a.) On August 20, 2002, DaimlerChrysler filed a timely motion for rehearing pursuant to MCR 7.215(H)(1). The Court of Appeals denied rehearing on September 12, 2002. (96a.)

On October 3, 2002, DaimlerChrysler filed in this Court a timely application for leave to appeal pursuant to MCR 7.301(A)(2) and 7.302(C)(2)(c). On April 8, 2003, this Court issued an order granting DaimlerChrysler's application for leave to appeal. This Court has jurisdiction over all issues presented in DaimlerChrysler's appeal.

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[1] All citations in the form "__a" refer to the Appellant's Appendix.

STATEMENT OF QUESTIONS INVOLVED

1. Whether a plaintiff alleging co-worker sexual harassment under the Elliott-Larsen Civil Rights Act must establish as part of her prima facie case that her employer had timely and adequate actual notice of the alleged harassment, such that a plaintiff who avoids her employer's complaint procedure but contends that her employer received notice by means of deposition and trial testimony months or years after the alleged incidents of harassment, as well as by the purportedly pervasive nature of the alleged harassment, fails to establish a prima facie case.

Answer of the courts below: No.

DaimlerChrysler's Answer: Yes.

2. Whether a plaintiff alleging co-worker sexual harassment under the Elliott-Larsen Civil Rights Act must establish as part of her prima facie case that her employer failed to make reasonable, good faith efforts to address complaints of alleged harassment of which it had timely and adequate actual notice.

Answer of the courts below: No.

DaimlerChrysler's Answer: Yes.

3. Whether the persistently improper and highly prejudicial conduct of plaintiff's lead counsel throughout trial, and particularly during closing argument, fundamentally tainted the proceedings and mandates a new trial.

Answer of the courts below: No.

DaimlerChrysler's Answer: Yes.

4. Whether Michigan law allows social workers to render expert medical opinion testimony regarding the diagnosis and cause of a plaintiff's claimed physical and psychological illness, as well as the uncorroborated prognosis that alleged sexual harassment would lead to a plaintiff's premature death from organic pathologies.

Answer of the courts below: Yes.

DaimlerChrysler's Answer: No.

5. Whether DaimlerChrysler is entitled to a new trial because of the trial court's erroneous and prejudicial evidentiary rulings that (1) allowed the plaintiff to call as a witness a social worker who did not appear on her witness list, (2) excluded DaimlerChrysler's expert witness proffered to rebut surprise testimony from plaintiff's expert because DaimlerChrysler's witness was not on its witness list, and (3) allowed the jury to find that plaintiff's depositions were notice to DaimlerChrysler and triggered a duty to remediate.

Answer of the courts below: No.

DaimlerChrysler's Answer: Yes.

6. Whether the jury's $21,000,000 compensatory damage award in this sexual harassment case, which is grossly excessive in comparison to prior awards, arbitrary, punitive, irrational, and the product of bias and prejudice incited by improper arguments by plaintiff's counsel, must be set aside and a new trial or drastic remittitur ordered as a matter of Michigan law and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Answer of the courts below: No.

DaimlerChrysler's Answer: Yes.

INTRODUCTION AND SUMMARY OF ARGUMENT

During seven years of employment with Defendant-Appellant DaimlerChrysler Corporation ("DaimlerChrysler"), Plaintiff-Appellee Linda Gilbert complained to the company regarding six incidents of allegedly improper conduct. Five of those incidents involved the anonymous placement of sexually-oriented material in her work area, and the sixth concerned a comment by a co-worker. Each incident was promptly and fully investigated pursuant to company policy, and DaimlerChrysler formally reprimanded the employee who allegedly made the comment. So far as DaimlerChrysler knew, the workplace had been rid of any further employee misconduct.

In her deposition testimony and at trial, however, Ms. Gilbert and her counsel conjured up "15,000" alleged incidents of sexual harassment at DaimlerChrysler—or roughly six *per day*, assuming she worked seven days a week—or several *thousand* times as many incidents as she actually reported to the company. Not a single one of these alleged incidents involved physical touching or propositioning for sex. Nevertheless, social worker Stephen Hnat, who lied about his credentials and concealed his close and long-standing relationship with Ms. Gilbert's counsel, was allowed to testify as an expert that Ms. Gilbert's experience at DaimlerChrysler had altered her brain chemistry and would cause her to *die a premature death* in the most painful way imaginable. To make matters worse, Ms. Gilbert's trial counsel, Geoffrey Fieger, pointedly reminded the jury that DaimlerChrysler was a German entity, made strained comparisons to the Holocaust likening DaimlerChrysler to the Nazis, played to local prejudices against a foreign corporation that merged with a well-known Michigan business, and exhorted the jury to act as the "conscience of the community" by awarding a massive verdict that would "ring the bell of justice," even though punitive damages are not available for sexual harassment in Michigan.

The result was a staggering $21,000,000 verdict, at least $20,000,000 of which is purportedly for non-economic compensatory damages. With pre-judgment and post-judgment inter-

est, the award is now approaching $40,000,000. Neither the trial court nor the Court of Appeals remitted even one dollar of the judgment, despite the Court of Appeals' recognition that "the conduct in this case" is "somewhat lower on the continuum of harassment" relative to other cases of harassment. The lower courts were not in the least bit disturbed by the fact that the award here was *more than 70 times greater* than the largest sexual harassment award ever affirmed in a published Michigan appellate ruling, 70 times the maximum award permitted under analogous federal sexual harassment law for compensatory and punitive damages combined, and the largest affirmed award to an individual sexual harassment plaintiff in United States history.

As shown below, the judgment is the product of four substantial, prejudicial errors. Each error alone warrants reversal of the judgment. Combined, however, these errors grossly violated DaimlerChrysler's common-law, statutory, and constitutional rights, denied the company any semblance of a fair trial, and led to a judgment that defies any rational notion of compensation, a record-breaking award in a case of conduct "low[] on the continuum of harassment."

First, the record does not support a finding that DaimlerChrysler is liable for sexual harassment. The company had in place an effective policy for reporting complaints of harassment, yet Ms. Gilbert failed to use that policy to report the vast majority of the alleged incidents (*i.e.*, 14,994 out of 15,000). Instead, she waited months or years before disclosing her allegations during deposition or trial testimony in this litigation, in many instances long after the employees at issue had ceased to work for DaimlerChrysler. For five of the six incidents that she *did* report, Ms. Gilbert willfully withheld the names of the people she believed responsible, supposedly because she did not want them to be punished. As a result, DaimlerChrysler was deprived of any meaningful notice of the conduct that served as the basis for the massive judgment, and thus its efforts to take prompt and effective remedial measures to rid the workplace of harassment were

hamstrung by Ms. Gilbert herself. The record plainly demonstrates that DaimlerChrysler did the very best it could in light of Ms. Gilbert's lack of cooperation. Because the record reveals no fault on the part of DaimlerChrysler, the company cannot be held liable for sexual harassment under the Elliott-Larsen Civil Rights Act. Judgment notwithstanding the verdict is required.

Second, the lower courts ignored, and indeed rewarded handsomely, the egregious misconduct of Ms. Gilbert's trial counsel, Geoffrey Fieger. Mr. Fieger made calculated appeals to ethnic and local prejudices, misstated the record, and exhorted the jury to return what was plainly an unlawful award of punitive damages. Mr. Fieger has been rebuked repeatedly by appellate courts for exactly this kind of misconduct, and unless this Court announces clear standards, nothing will stop Mr. Fieger's shameful antics. This misconduct fundamentally taints the verdict, and the judgment must be reversed.

Third, the courts below endorsed the admission of patently medical expert testimony from Mr. Hnat, a social worker with no medical license or degree. Mr. Hnat, who never physically examined Ms. Gilbert and whose assumptions regarding her alcohol abuse were flatly contrary to her own trial testimony, was permitted to offer his own purported diagnoses "to a reasonable degree of psychological certainty" regarding her brain chemistry, brain "fatigue," and alleged physical "decompensation," as well as supposedly interpreting medical records prepared by licensed doctors. Mr. Hnat offered the absurd and unprecedented opinion that Ms. Gilbert would actually die from harassment as a result of pancreatitis and that her death would be the most painful imaginable. The obvious error in admitting this surprise and improper testimony was exacerbated by the exclusion of DaimlerChrysler's proffered rebuttal expert, a *properly* qualified physician specializing in psychiatry. Mr. Hnat's "expert" medical testimony was the only evidence purporting to supply a causal link between the mistreatment Ms. Gilbert claims to

have experienced and the gigantic "anticipatory wrongful death" verdict. Thus, the jury was permitted to hear four days of emotional, inflammatory, and utterly incompetent medical testimony, bolstered by the appearance of legitimacy conferred by Mr. Hnat's "expert" status, while DaimlerChrysler was deprived of any meaningful opportunity to oppose that testimony. These evidentiary errors require reversal.

Fourth, the lower courts evaded their duty to review damages awards to prevent arbitrary or excessive verdicts. This Court has previously held that damages awards should be compared to results in factually comparable cases as part of the excessiveness inquiry. The need for such review is especially acute where, as here, the verdict involves non-economic "pain and suffering" damages, which by their nature are vague, amorphous, and standardless. Nevertheless, the lower courts refused to consider the numerous awards in comparable cases that DaimlerChrysler presented as evidence that the verdict here is excessive. Indeed, the award here was obtained in part through the use by Ms. Gilbert's counsel of inflammatory punitive damages rhetoric, even though Michigan law does not allow an award of punitive damages in Elliott-Larsen sexual harassment cases. The tainted judgment is excessive, unconstitutional, and cannot stand.

STATEMENT OF FACTS AND PROCEEDINGS

Unless noted otherwise, the facts set forth in this statement of the case are either undisputed or based on a construction of disputed evidence in the light most favorable to Ms. Gilbert. As will be demonstrated at various points throughout this brief, however, the lower courts misstated the record in several important respects, apparently treating as "evidence" the questions and arguments of Ms. Gilbert's counsel, regardless of the actual testimony of witnesses. Those distortions of the record unfairly and inaccurately attempted to paint a picture of seven years of

daily mistreatment of Ms. Gilbert by co-workers and supervisors, with a gender-derogatory tone to the conduct, when in fact the record in no way supports that view.[2]

I. Factual Background

A. Commencement Of Ms. Gilbert's Employment With DaimlerChrysler

Linda Gilbert has had a very troubled life. In the words of the Court of Appeals, she experienced "physical and verbal abuse by family members when she was a child; . . . involvement with a manipulative boyfriend who sold drugs; poor or nonexistent family support; and minimal opportunities for relaxation." (66a.) She has a history of alcoholism and cocaine use that pre-

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[2] For example, in excusing Ms. Gilbert's failure to complain to DaimlerChrysler about the alleged incidents she relied on at trial, the Court of Appeals stated that "[s]even years of daily reference to Gilbert as an 'asshole,' 'bitch,' 'whore,' and 'cunt' connected these incidents." (74a.) The evidence, however, does not support that conclusion. Only Ms. Gilbert and three other witnesses testified on this issue. One co-worker witness made no mention of profanities directed toward Ms. Gilbert (daily or otherwise) (Whitenight), and another did not recall any inappropriate comments to or about her. (578a-579a (Gupton).) A third co-worker recalled only one objectionable comment made directly to Ms. Gilbert (726a-727a (Lemmerz)), and while he heard her referred to derogatorily behind her back, he described it as conduct that went on "for months," not seven years. (709a.) Moreover, that third co-worker stopped working with Ms. Gilbert in December 1994, and thus could not have had first-hand knowledge of daily incidents from 1995 through 1999. (713a.) Nor does Ms. Gilbert's testimony support the court's characterization of the evidence. She claims to have been called a number of profanities throughout the course of her employment, but nowhere does she claim that there were "daily references." In fact, throughout all of her testimony, she recalled only six such specific incidents. (869a-870a, 896a-898a, 906a, 1003a-1007a, 1358a.)

Another critical distortion is the Court of Appeals' assertion that "[i]n comments made in reference to her among the men, the male millwrights, and some of her supervisors, called Gilbert 'bitch,' 'whore,' 'cunt,' 'asshole,' often adding 'fucking' to these epithets." (59a.) The court unmistakably implies that Ms. Gilbert's supervisors routinely referred to her in these terms. In fact, the record contains only three references to supervisors having used profanity either in her presence or in reference to her. Ms. Gilbert testified that one supervisor once told her to "clean out her f***ing ears" and on another occasion referred to her, when speaking to others, as a "bitch." She stated that another supervisor once directed her to calibrate a machine within a "c**t's hair of perfection." (829a-831a, 860a-861a, 1032a-1033a.) That is the sum total of alleged profanity by supervisors. While DaimlerChrysler does not condone the use of such language by its supervisors under any circumstance, there is a world of difference between supervisors regularly calling Ms. Gilbert such names to her face (which she does not allege occurred) and such words being used three times in seven years in work-related conversation.

dated her employment with DaimlerChrysler. (59a.) In the period from late 1991 to early 1992, Ms. Gilbert "was arrested for drunk driving and was involved in an altercation at a bar." (59a.)

Ms. Gilbert began working as a millwright at DaimlerChrysler's Jefferson North Assembly Plant ("JNAP") in March 1992. She has remained employed there to this day. (792a.) JNAP is a very large facility with roughly 5,000 employees working multiple shifts in several departments spread out over two million square feet. (518a-519a, 536a, 1156a.) Millwrights are troubleshooters who constantly move throughout the work area during their shifts in order to repair assembly line machinery or to assist with facility maintenance. (570a.) Supervisors spend very little time during the course of a shift with any given millwright. (1112a-1113a.)

B. DaimlerChrysler's Policies Against Harassment

Since JNAP opened in 1992, it has been governed by DaimlerChrysler's corporate policy prohibiting sexual harassment, which instructs employees to report promptly any harassing conduct and provides for "necessary and appropriate discipline, up to and including discharge." (1473a.) This policy was distributed to all JNAP employees, including Ms. Gilbert. (918a-919a, 1473a.) JNAP union employees, including Ms. Gilbert, are also covered by a collective bargaining agreement that establishes a procedure for grieving complaints of sexual harassment. (555a-556a, 1477a-1478a.)

C. Ms. Gilbert's Complaints And DaimlerChrysler's Responses

During the seven years from the time Ms. Gilbert began working at JNAP until trial, she reported through the company's complaint procedure six incidents of inappropriate conduct, two of which were reported at the same time. Five of the incidents involved the anonymous placement of sexually oriented materials in her workplace—two cartoons, a photograph, a poem, and an article by "Dr. Ruth"—and the sixth involved an inappropriate comment by a co-worker.

None of these incidents involved name-calling or conflicts with co-workers, the kinds of alleged incidents that constituted the vast majority of Ms. Gilbert's allegations at trial.

First, on May 25, 1993, Ms. Gilbert reported finding in her toolbox a cartoon she described as a woman about to perform fellatio, marked with her name and the names of co-workers. (1448a, 1450a-1451a.) DaimlerChrysler management took her statement, apologized, and investigated. (463a-467a, 913a-918a, 1147a-1151a, 1450a.) Within three days, management began calling employees, including those named on the cartoon, into closed-door meetings at which a union steward was present. (463a-467a, 1172a.) The employees were asked whether they had any information, counseled on DaimlerChrysler's harassment policy, and warned that any violation could lead to termination. (465a-468a, 1100a, 1172a.) Management also spoke with workers on the plant floor as well as supervisors on other shifts to see whether they had any information, and supervisors began patrolling Ms. Gilbert's work area. (1102a-1103a.)

Second, on June 5, 1993, while the first investigation was underway, Ms. Gilbert reported finding on her toolbox a photograph of a penis. (1449a.) DaimlerChrysler management apologized and informed her that it was still investigating to try to determine who was responsible for the prior incident. (404a, 419a-420a, 1105a-1106a.) The company concluded that because the photograph was not present when Ms. Gilbert reported for her shift, the person(s) responsible must be assigned to her shift. (1450a-1451a.) Company management held meetings until every skilled trades worker on Ms. Gilbert's shift had attended, although no one disclosed the name of any person responsible. (1099a-1102a.) During the investigation, Ms. Gilbert neither disclosed the identity of those she believed responsible nor mentioned any previous incidents of alleged harassment. (460a-462a.) She requested a transfer to a different work area, the company ac-

commodated that request, and the conduct ceased. (583a, 827a, 840a.)[3] Ms. Gilbert filed this lawsuit in March 1994.

Third, on October 10, 1994, sixteen months after the previous complaint, Ms. Gilbert reported finding a vulgar cartoon captioned "Highway Signs You Should Know" inside her locker that day. At the same time, she reported that an article by Dr. Ruth Westheimer on a sexual topic had been taped to her locker approximately one week earlier. (1370a-1371a, 1453a-1455a, 1464a.) There was no indication that these incidents were related to the 1993 incidents because the circumstances were altogether different and, as her shifts in 1993 and 1994 were different, the pool of potentially responsible employees was different. (519a-520a.) Human resources informed Ms. Gilbert that something would be done about the situation, interviewed her at length, and asked whether she knew who was responsible. (521a, 538a, 544a.) Ms. Gilbert responded that she did not know, and she mentioned no other incidents of alleged harassment. (545a, 562a-563a.) Human resources spoke with supervisors and met with the union stewards on all three shifts, telling them to spread the word that the matter was being investigated and that the responsible persons could be discharged. (553a-554a.) Human resources patrolled Ms. Gilbert's work area for several weeks to investigate and to establish a presence, and supervisors questioned individual employees. (496a, 540a-541a, 561a-562a.) The alleged misconduct again ceased.

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[3] The Court of Appeals mischaracterized the record when it wrote that "Battaglia and Pilon decided that the best remedy to the problem would be to transfer Gilbert. When Gilbert consented . . . ." (61a.) Not a single witness testified that management initiated Ms. Gilbert's transfer, and she testified that it was her idea, not management's. (827a, 840a.) Nevertheless, the Court of Appeals inexplicably endorsed the falsehood touted by Mr. Fieger at trial that the transfer was management's choice and preferred remedy. Mr. Fieger attempted to badger witnesses until they agreed with this proposition, but to no avail. (527a-529a.) Notably, after misrepresenting that the transfer was forced upon Ms. Gilbert, the Court of Appeals added an additional negative spin when it wrote that "this was not a favorable assignment because the paint shop had noxious fumes, which was of particular concern to Gilbert, an asthmatic." (67a.) This, too, was a theme touted by Mr. Fieger at trial, but there is no evidentiary support for it.

Fourth, on March 12, 1995, Ms. Gilbert reported the posting of a vulgar poem on a bulletin board approximately twenty yards from her work area. (1456a-1457a.) Human resources immediately began an investigation, interviewed Ms. Gilbert, contacted supervisors, and took photographs of the area. (1127a-1130a.) Ms. Gilbert denied knowing who might be responsible, and she did not mention any other incidents of alleged harassment. (1129a-1130a.) DaimlerChrysler promptly removed the bulletin board. (1131a.) Again, the alleged mistreatment ceased.

Fifth, on September 2, 1997, two and a half years later, Ms. Gilbert complained that a coworker made comments about his "big piece of meat" in front of her and other employees. (859a-860a.) DaimlerChrysler took statements from the parties involved, and Ms. Gilbert mentioned no other alleged misconduct. (1458a-1461a.) The company formally reprimanded the coworker, and Ms. Gilbert never complained about that employee again. (882a, 1463a.) Indeed, Ms. Gilbert thereafter reported no other alleged harassment whatsoever.

Although Ms. Gilbert reported the name of the alleged harasser regarding only the last incident, she believed that she knew who was behind all six. (1350a-1351a, 1417a.) As she admitted, "I always knew but I didn't feel like I should say." (1417a.) This refusal to reveal names of alleged harassers was purportedly due to Ms. Gilbert's concern that those individuals would be fired. (944a-947a.)

II. Proceedings In The Circuit Court

A. New Allegations During Depositions And Trial

1. Ms. Gilbert's November 3, 1994 Deposition

Ms. Gilbert filed her Complaint on March 25, 1994, alleging a violation of the Elliott-Larsen Civil Rights Act. (97a-103a.) At that time, she had reported to DaimlerChrysler only two incidents of alleged harassment. At the first session of her deposition, on November 3, 1994, Ms. Gilbert testified regarding many previously unreported alleged incidents of harass-

ment.[4] For example, she stated that on her first day on the job in March 1992, more than two and a half years before her deposition, a co-worker commented at an off-site training session about "get[ting] to hold the ladder" when Ms. Gilbert "[wore] a dress to work." (1327a-1329a.) She claimed that not long after that, a supervisor (Potempa) screamed at her in front of other employees (1391a-1392a) and that during her first year at JNAP a co-worker called her a profane name during a card game. (1329a-1332a.) She stated that in early 1992 her toolbox was blocked approximately three times. (1333a-1334a.) She testified that two co-workers (Negoshian and Ernat) treated her as though she were not there and that one of them tried to get her in trouble by falsely reporting that she had left her work area. (1335a-1336a, 1340a-1342a.) She stated that in March or April 1993, she found a cartoon derogatory toward women taped to her toolbox with the word "bitch" written on the tape. (1342a-1343a.) Each of these alleged incidents preceded Ms. Gilbert's transfer, which occurred after her June 1993 complaint.

Ms. Gilbert testified that within a month after her transfer she found a *Penthouse* magazine on her toolbox. (1355a-1356a.) She stated that an article entitled "Why Men Have So Many Sperm" was placed near her drink. (1356a-1357a.) She alleged that a supervisor (Hicks) referred to her as a "bitch" when she was not present and once told her to "clean out [her] f***ing ears" when she said that she could not understand a co-worker. (1357a-1358a.) These incidents allegedly occurred four to sixteen months before her deposition.

Ms. Gilbert also testified that during the summer of 1994 "some type of liquid" that she could not identify had been poured on her chair. (1375a-1376a.) She alleged that she immediately disposed of the chair. (1376a.) She stated that in or around early September 1994, she

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[4] DaimlerChrysler moved in limine to exclude that testimony and all other evidence regarding unreported alleged incidents, but the trial court overruled that motion. (345a-372a.)

found her belongings "knocked over" and that empty cans had been shoved into her locker. (1370a, 1373a-1374a.)

2. Ms. Gilbert's January 14, 1997 Deposition

At the second session of her deposition, on January 14, 1997, Ms. Gilbert testified regarding more previously unreported alleged incidents. She stated that two co-workers (Pappagano and Barr), who were no longer with the company in 1997, made demeaning comments to her. (1417a-1420a.) When asked if they made *sexual* comments to her, Ms. Gilbert could not provide specifics, saying only that there were "innuendoes." She also described further incidents of non-sexual comments by Negoshian and Ernat, the two former employees with whom she had conflicts identified in her first deposition session. Those employees left the company as of 1994, and she had not worked with them since 1993. (1424a-1425a.)

3. Trial

In her July 1999 trial testimony, Ms. Gilbert referred to still other previously unreported incidents. She claimed to recall two inappropriate comments from the off-site training session in early 1992. (892a-893a.) She stated that in 1993, someone left a hose assembled in the shape of a penis on her toolbox. (819a.) She testified that a supervisor once used the phrase "within a c**t's hair" to describe the precision required on a job. (860a-861a.) She stated that a co-worker (Cheski) made lewd comments such as "hi honey, how is your love life?" (861a, 868a.) She testified that a different co-worker (Bragg) once said "do not listen to the c**t" (869a-870a) and that another co-worker (Rials) once called her a "useless bitch." (1007a.) She stated that someone broke into her locker. (961a-963a.) Ms. Gilbert testified that a co-worker (Kryza) who drove her to and from work once called her a "bitch." (1003a.) For the first time, she also purported to identify the liquid that had been on her chair in approximately September 1994, de-

scribing it as urine even though in her November 1994 deposition she had been unable to identify it and she had long ago discarded the chair. (801a, 835a, 940a-943a.)

Ms. Gilbert gave additional testimony only in very general terms. For example, she claimed that co-workers routinely refused to assist her, but she failed to identify any specific incidents beyond the few that management had observed and addressed promptly. (817a.) She also asserted that she was called an assortment of obscene names by her co-workers, but she failed to specify who said what or under what circumstances. (802a.) Ms. Gilbert claimed, in conclusory fashion, to have been a victim of "constant," "daily" harassment that, as of the time of trial, was still occurring, but she could not, in her words, "point all of [it] out." (798a-799a, 805a, 850a, 877a.)

B. "Expert" Medical Testimony From Social Worker Stephen Hnat

The trial court allowed Stephen Hnat to testify, over objection, as an expert on "substance abuse care and treatment." (605a.) Mr. Hnat has a master's degree in social work, and he counseled Ms. Gilbert intermittently between February 1992 and March 1994. He has no degree or license in medicine or psychiatry, although he falsely testified and stated on his résumé that he has a master's degree in "psychobiology."[5] (590a-591a, 1465a (résumé).) In four crucial days of testimony, Mr. Hnat opined that notwithstanding Ms. Gilbert's long history of alcohol and drug abuse, she was in recovery at the time of her March 1992 hire at JNAP and remained sober

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[5] DaimlerChrysler discovered this fraud shortly after trial. Mr. Hnat stated to the jury that in addition to his degree in social work, he received a master's degree in "psychobiology" from the University of Michigan and a prestigious undergraduate award, the Pillsbury Prize. (588a-591a.) Neither assertion was true, and upon learning of Mr. Hnat's deception DaimlerChrysler promptly submitted evidence to the trial court demonstrating this fraud. (253a-254a.) Mr. Hnat then conceded that both representations were inaccurate but claimed inadvertence. (310a.) The trial court refused even to hold an evidentiary hearing.

for one and a half years thereafter.[6] He opined to a "reasonable degree of psychological certainty" (611a-612a) that the alleged harassment changed her brain chemistry and fatigued her brain, producing a new, irreversible, life-threatening condition known as "major depressive disorder," in addition to her relapse into alcoholism. (608a-612a, 615a-621a, 628a-632a, 638a-655a, 659a-662a, 680a-681a.)

Mr. Hnat began counseling Ms. Gilbert when she was on probation following conviction for drunken driving. (256a-267a.) Although he had not counseled her in more than five years preceding trial, he reviewed Ms. Gilbert's medical records prepared by licensed professionals and drew the conclusion that those records read "like a preview of [her] death certificate." (678a.) In his opinion, the records demonstrated that Ms. Gilbert's body was beginning to "decompensate" and that she is "clearly dying, that is what it means, she is clearly dying." (633a-634a, 678a.) He predicted: "I wouldn't bet on her living very long."[7] (681a.) According to Mr. Hnat, who had never physically examined Ms. Gilbert, she would in all likelihood die from pancreatitis, which he described as "the most painful way to die." (678a, 683a.)

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[6] This opinion conflicts with the trial testimony of Ms. Gilbert, who admitted relapsing into periods of drinking during 1992, could not say how much or how often she drank at that time, was not sober throughout 1992, and, in fact, was arrested twice in the summer of 1992 for drunk driving and was convicted that September. (991a-996a.) She agreed with the testimony of one of her supervisors that she spoke to him that summer in connection with her attendance and drinking problems. (509a.)

[7] Once again, Mr. Hnat's "expert" opinion did not square with the evidence. Ms. Gilbert herself testified that she has never been diagnosed as having a terminal illness and that, far from being a terminal alcoholic, she was "never going to quit trying to get better" and did not feel as if she was dying. (856a-857a, 867a, 1035a.)

C. Further Medical-Plus-Sexual-Harassment "Expert" Testimony From Social Worker Carol Katz

The trial court also admitted, over objection, the testimony of Carol Katz, another social worker without a degree or professional license in medicine or psychiatry, who was not named on Ms. Gilbert's witness list. (686a-702a.) Although the court ruled that Ms. Katz could testify as only a fact witness, she was permitted to state opinions on medical issues and sexual harassment. According to the Court of Appeals, "Katz believed that harassment was a well-known phenomenon for women who tried to break into a male-dominated workplace or career, irrespective of the individual's background." (67a.)

D. Exclusion Of DaimlerChrysler's Expert, Who *Is* A Real Physician

DaimlerChrysler originally planned to call no medical witnesses. Once the trial court allowed Mr. Hnat to offer completely unforeseeable expert medical testimony, however, DaimlerChrysler promptly proffered as a rebuttal witness Dr. Rosalind Griffin, a licensed physician specializing in psychiatry, to address the medical issues raised by Mr. Hnat's testimony. (1079a-1081a.) The trial court refused to allow Dr. Griffin to testify, because she was not originally listed on the final pre-trial order and because the trial court considered Mr. Hnat's testimony to be perfectly ordinary and expected. (1087a-1091a.)

E. Misconduct By Ms. Gilbert's Lawyer, Geoffrey Fieger

Ms. Gilbert's trial counsel, Geoffrey Fieger, engaged in pervasive misconduct throughout trial, making assertions, asking questions, and leveling accusations with no reasonable basis in the evidence, calculated to incite a verdict based on passion, bias, and prejudice. (411a-414a, 421a-437a, 461a-462a, 476a-477a, 485a-486a, 506a-507a, 543a, 632a-633a, 648a, 672a, 878a, 891a-892a, 983a, 989a-995a, 999a, 1012a, 1026a, 1139a-1143a, 1163a, 1165a, 1167a.) "[T]o recite all such instances [of misconduct] would result in a restatement of the entire record of pro-

ceedings," *Badalamenti v. William Beaumont Hosp.—Troy*, 237 Mich. App. 278, 291 n.4, 602 N.W.2d 854 (1999), but a few examples will show how Mr. Fieger grossly exceeded the bounds of acceptable advocacy.

Mr. Fieger stressed two impermissible themes during Ms. Gilbert's case and again during closing argument. First, he repeatedly invited the jury, without using the word "punitive," to award punitive damages. He repeatedly used classic punitive damages rhetoric, exhorting the jury to act as the "conscience of the community" and to "ring the bell of justice" loud enough so that it could be heard in Germany. (1211a, 1215a, 1268a.) He asked for a $140,000,000 verdict to serve as a "symbol" and to prevent such conduct in the future, to show that "we as a civilized society will not stand for this type of conduct" and that we "won't stand by and wait for a company that . . . cares apparently . . . far more about the production of product than for human beings." (1270a, 1274a-1276a.) He played on DaimlerChrysler's corporate power and accused the company of "seven years of corporate sponsored torture" (1272a) and seven years of "brutal, brutal sexual abuse." (1230a.)

Second, Mr. Fieger played upon prejudices based on the German citizenship of DaimlerChrysler and its management. He urged the jury to send a message that would be heard in "Germany," in "Stuttgart." (1268a.) He argued that the only way to stop a "multi-national corporation" like DaimlerChrysler—which had only months earlier resulted from the highly-publicized merger of Daimler-Benz and Chrysler Corporation, a major local company—was to act "symbolically" through a verdict. (1210a.) Mr. Fieger repeatedly invoked the plight of the "people of Israel," even likening Ms. Gilbert's experience to the "unspeakable horrors that were perpetrated" against those people at the hands of the Nazis. (1260a, 1267a.) He elicited testimony from his "expert," Mr. Hnat, along these lines as well, with Mr. Hnat comparing

Ms. Gilbert's mental state to the conditions experienced by "people in concentration camps." (613a.) Mr. Fieger asked Mr. Hnat directly whether Ms. Gilbert "develop[ed] a second disease very similar to the disease you have described with concentration camp survivors." (608a-609a.)

Two short excerpts from Mr. Fieger's closing argument are particularly instructive:

> Never again. Never again. That is a line now used by the [sabras] in Israel, the land of Israel, to mean that the unspeakable horrors that were perpetrated on the people of Israel, on the Jews, must never be forgotten and must never happen again. Never again.

(1206a.)

> We are a nation of laws, not powerful individuals. We are a nation of laws. They must, therefore, be required to treat Linda, and any other woman, any other human being, I need to say, with dignity and worth.
>
> And, I can assure that [your] verdict will be heard from the floor of that plant on Jefferson to the board room in Auburn Hills or Stuttgart. They will recognize that this, you have spoken, and that this shall never, ever, ever, ever happen again. Once they hear in Auburn Hills and in Germany about Linda, and, apparently, they haven't yet, once they hear and what she has gone through, it will stop. It will stop. But it doesn't appear as if they know anything about this situation. And, therefore, unless there is full and complete justice in this case, unless we ring the bell of justice loud enough and high enough in that tower of justice, after beating her down, after beating her down, after beating her down, after beating her down for seven years, unless by your verdict you ring that bell of justice in a tower so high that it resonates throughout this land that you have spoken, you have examined the evidence, that you have observed the law. That you have duly considered what was done to her, and what justice will be. And then release, her suffering can never be taken away. Your verdict stands as a symbol against the tyranny that was directed at Linda from the moment that she arrived at Daimler-Chrysler until today. And, unless that occurs, no one will hear.

(1268a.)

Mr. Fieger even attacked DaimlerChrysler's counsel, suggesting that she had been forced to do improper things. He interrupted her closing argument to accuse her of lying about whether medical records had been produced and whether Ms. Gilbert had voluntarily sought treatment for alcoholism. (1286a-1289a.) He began his rebuttal argument by opining that "DaimlerChrysler forced her [its lawyer] to do things that are, in my mind, not simply objectionable, but unforgiv-

able," including "to provide a defense that doesn't exist," and stated that he was "ashamed" of the company's closing argument. (1291a, 1307a.) Mr. Fieger also emphasized to the jury—twice—DaimlerChrysler's lack of an expert witness to rebut the testimony of Mr. Hnat and Ms. Katz, even though DaimlerChrysler *had* proffered exactly such an expert, but Mr. Fieger successfully opposed the introduction of that testimony. (1248a-1250a, 1254a.)

Mr. Fieger's misconduct was not confined to closing argument. Mr. Fieger had a long-standing relationship with Mr. Hnat, his star "expert" witness, yet he purposely concealed Mr. Hnat's bias. Mr. Fieger strove in his opening statement to create the impression that Mr. Hnat was impartial and independent, stating that his affiliation with Mr. Hnat was of recent origin and a mere "coincidence," and that their association did not begin until 1998—"many, many years" after Mr. Hnat treated Ms. Gilbert. Among other things, Mr. Fieger said:

> Mr. Hnat has worked on my campaign for governor years later, probably six years after he treated Linda Gilbert. He has worked in my office for my law firm on other cases *in the years 1998 and 1999.*
>
> . . . .
>
> Under normal circumstances lawyers don't have personal contact but *it just so happened that coincidentally that this man had personal contact with me* and I expect that the attorney for Chrysler will bring that up. I can't change the facts in this case, but they have nothing to do with Linda Gilbert. *He did not work for my law firm or for me or have any personal contact during the facts in this case.*
>
> *It just so happened that many, many years later, in 1998 and 1999 while this lawsuit was pending, he has since had personal contact with me and has worked for my law firm in my campaign for governor.*

(389a-391a (emphasis added).)

On the witness stand, Mr. Hnat attempted to further this picture of professional and personal distance from Mr. Fieger. He testified that he was then "primarily employed as a psychiatric social worker" and denied that he was working exclusively, or even predominantly, for Mr. Fieger's law firm. (585a, 594a-599a, 704a-705a.)

Unbeknownst to DaimlerChrysler, Mr. Fieger's representations and Mr. Hnat's testimony were falsehoods and half-truths. In fact, Mr. Hnat and Mr. Fieger had been friends "since . . . college" in Ann Arbor, and "over the years [the relationship] evolved" into something more. Indeed, Mr. Hnat had consulted for Mr. Fieger "[s]ince about the late '80's," including "well over thirty" trials, "16 or 17" of which purportedly produced multi-million-dollar verdicts. (190a-204a (transcript of Court TV interviews with Stephen Hnat).) A *Detroit News* article on the 1998 "Fieger for Governor" campaign's inner circle describes Mr. Hnat as a "close Fieger friend for 20 years" and quotes Mr. Fieger as saying: "He's my closest personal adviser." (205a-206a.) And a posting on Mr. Fieger's 1998 gubernatorial campaign website further illustrated the nature and extent of their relationship:

> What IS "Fiegertime"?
>
> It originally started as [sic] personal joke between me and a friend, Stephen Hnat. *After selecting a jury for a trial he would always say "Fiegertime" meaning time to have fun and kick some butt.*

(221a.)[8]

F. The Verdict And Post-Trial Motions

The jury returned a verdict in Ms. Gilbert's favor in the amount of $21,000,000. Of that amount, $20,000,000 was awarded to "compensate" for past and future mental anguish, physical pain and suffering, and the like, and $1,000,000 was awarded "in trust" for the loss of future

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[8] DaimlerChrysler submitted documents revealing that Mr. Fieger was Mr. Hnat's personal attorney in at least two actions filed in 1990 and 1991, and his law firm handled Mr. Hnat's divorce in 1992, a period that overlapped with Mr. Hnat's treatment of Ms. Gilbert. Moreover, contrary to Mr. Hnat's trial testimony that he was "primarily employed" as a social worker, Mr. Fieger's law firm was, according to an April 1999 Friend of the Court submission, in fact Mr. Hnat's "principal employer." (225a.)

earnings capacity and the cost of future medical and psychological care.[9] (1318a.) On October 8, 1999, the trial court entered judgment in the amount of $21,000,000 plus pre-judgment interest, for a total judgment of $30,645,933. (3a-4a.)

On October 29, 1999, DaimlerChrysler filed timely motions for judgment notwithstanding the verdict, a new trial and/or remittitur, an evidentiary hearing, relief from judgment, and a new trial based on fraud on the court by Mr. Fieger and Mr. Hnat. On May 1, 2000, the trial court denied DaimlerChrysler's post-trial motions. (8a-57a.)

III. Proceedings In The Court Of Appeals

In a 38-page unpublished opinion, the Court of Appeals affirmed the trial court in all respects, refusing to remit even a single dollar of the massive verdict. As noted above, in reaching that result the Court of Appeals relied on a distorted and unsupportable treatment of the record.

The court held that there was sufficient evidence to support Ms. Gilbert's sexual harassment claim and that it was not error to allow her to premise her claim not just on the six events she had reported to management, but also on the amorphous collection of other allegations that she first revealed in her depositions and at trial. (73a.) Although "the conduct in this case" is "somewhat lower on the continuum of harassment" relative to the more extreme cases of harassment, the court concluded that it was for the jury to decide whether Ms. Gilbert had proven a hostile environment claim. (75a.) The court held that DaimlerChrysler had notice of the alleged harassment, relying on a mixture of actual and constructive notice concepts. (75a-78a.) Notwithstanding the uncontradicted evidence that DaimlerChrysler had investigated and taken reme-

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[9] There was no evidence that would support an award for loss of future earning capacity. The evidence at trial, including from Ms. Gilbert herself, demonstrated that she was still (and is to this day) employed in the same job at JNAP. Indeed, Ms. Gilbert has been able to work seven days per week for long periods of time.

dial action regarding every incident that Ms. Gilbert reported pursuant to the company's complaint procedure, the court concluded that DaimlerChrysler had not taken adequate remedial measures. (78a.)

The court rejected DaimlerChrysler's claim that Mr. Fieger's misconduct, including *inter alia* repeatedly invoking "Holocaust victims who had immigrated to Israel" (83a), harping on the company's German identity, misrepresenting his relationship with his key expert witness, attacking defense counsel, and encouraging the jury to return a symbolic verdict against a large multinational corporation, warranted a new trial. The court took comfort, for example, in its view that Mr. Fieger "never drew any *explicit* connection between the Nazis and the German corporation." (83a (emphasis added).)

The court likewise concluded that the trial court had committed no prejudicial error in its evidentiary rulings, including allowing social worker Stephen Hnat to give essentially medical testimony. The court held that "'[a]ny limitations in' Hnat's 'qualifications are relevant to the weight, not the admissibility, of his testimony.'" (91a (citation omitted).) Conceding that "[a]t times, Hnat's testimony appeared to have a medical dimension" and "had a more traditional medical component," the court nonetheless found that "practice as a social worker" supported his testimony (91a), including the remarkable opinion that sexual harassment was causing Ms. Gilbert to relapse into alcoholism and would kill her in the most painful way imaginable. *See supra* pages 12-13. The court also found no error in the trial court's decision to allow opinion testimony from social worker Carol Katz and to preclude DaimlerChrysler from calling Dr. Rosalind Griffin as a rebuttal expert.

Finally, the court rejected DaimlerChrysler's argument that the shocking size of the verdict demonstrated that the jury had rendered an award that was in substantial part punitive.[10] (94a.) The court rejected the notion that the vast disparity between the $21,000,000 verdict and awards in comparable cases was further proof of excessiveness, declaring that "[w]hile some opinions make fleeting reference to comparable jury awards, the core analysis remains focused on the evidence in the case at bar," and relying on the fact that the award was "only about fifteen percent of the $140,000,000 Mr. Fieger argued was appropriate." (94a.) The court focused on Mr. Hnat's testimony. "[T]he jury in this case could have found compelling Gilbert's evidence that she would die an untimely death because of the effects of the harassment that Chrysler knew existed and did nothing to stop." (94a.) "Alternatively," the court stated, "the jury could have found persuasive Gilbert's evidence that her life was and would be completely joyless because the harassment had caused her to develop major depressive and post-traumatic stress disorders, changing fundamental chemistry in her brain." (94a.)

ARGUMENT

I. The Record Is Insufficient To Support A Finding Of Sexual Harassment Under The Elliott-Larsen Civil Rights Act

In the seven years from when Ms. Gilbert began working for DaimlerChrysler to the trial, she utilized the company's complaint procedure to report six incidents of alleged harassment, five of which involved anonymous placement of sexually-oriented materials in her work area, plus a boorish comment by a co-worker. DaimlerChrysler promptly and thoroughly investigated each alleged incident and took appropriate remedial steps, including formally reprimanding the

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[10] The court recognized that DaimlerChrysler objected on the issue of punitive damages, but found that the trial court's instruction to the jury that the arguments of counsel are not evidence and that the jury should follow the trial court's instructions was sufficient to remedy any problem. (79a-80a.)

employee who allegedly made the comment. Years later, Ms. Gilbert admitted that she knew all along who was responsible for the anonymous incidents as well but that she had chosen not to disclose the names because she did not want those individuals to be terminated or otherwise disciplined. In her deposition and at trial, Ms. Gilbert for the first time alleged that she had experienced numerous other instances of harassment involving profanity, rudeness, and boorishness on a "constant" and "daily" basis, which her counsel characterized as "15,000" instances of harassment. Even in that grossly exaggerated account, however, there is not one allegation of sexual advances, requests for sexual favors, physical touching, or retaliation for complaining about harassment.

Under Elliott-Larsen, a plaintiff alleging hostile work environment sexual harassment must prove that (1) she belongs to a "protected group"; (2) she was "subjected to communication or conduct on the basis of sex"; (3) she was "subjected to unwelcome sexual conduct or communication"; (4) the "sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment"; and (5) "respondeat superior." *Chambers v. Trettco, Inc.*, 463 Mich. 297, 311, 614 N.W.2d 910 (2000) (quoting *Radtke v. Everett*, 442 Mich. 368, 382-83, 501 N.W.2d 155 (1993)). This appeal focuses principally on the third, fourth, and fifth elements. The third element examines whether the conduct was "of a sexual nature" as specifically defined in Elliott-Larsen. The fourth element addresses whether the alleged harassment was sufficiently severe or pervasive to rise to the level of actionable misconduct. The final element, respondeat superior, focuses on whether the employer was at fault, and here a plaintiff must "prove that the employer failed to take prompt and adequate remedial action upon notice of the creation of a hostile work environment." *Id.* at 312. Unless a plaintiff demonstrates not only that the employer had timely

and adequate notice, but also that the employer failed to respond appropriately, the employer is not at fault. *Id.* at 312-13.[11]

Only the six alleged incidents that were contemporaneously reported to DaimlerChrysler through the company's complaint procedure may properly be considered in evaluating Ms. Gilbert's claim. As a matter of law, those six incidents do not amount to severe or pervasive harassment. Thus, DaimlerChrysler is entitled to judgment notwithstanding the verdict.[12]

A. DaimlerChrysler Did Not Have Notice Of Sexual Harassment

In *Chambers*, this Court strongly emphasized that "in cases involving a hostile work environment claim, a plaintiff must show some *fault* on the part of the employer."[13] 463 Mich. at

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[11] Under *Chambers*, it is clear that in the context of alleged co-worker hostile work environment sexual harassment, "respondeat superior" is synonymous with the "fault" principle this Court articulated, *i.e.*, notice and failure to remediate. 463 Mich. at 312-13.

[12] Rulings on motions for judgment notwithstanding the verdict are reviewed *de novo*. *Graves v. Warner Bros.*, 253 Mich. App. 486, 491, 656 N.W.2d 195 (2002). The reviewing court "examine[s] the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the nonmoving party." *Hord v. Envtl. Research Inst. of Mich. (After Remand)*, 463 Mich. 399, 410, 617 N.W.2d 543 (2000).

[13] The trial court did not charge the jury that it was Ms. Gilbert's burden to prove that she gave adequate and timely notice to DaimlerChrysler. The sole guidance was as follows: "The Plaintiff has the burden of proving that she was sexually harassed by the Defendant's employees, and that Defendant knew or should have known of the alleged hostile environment and failed to adequately investigate and take prompt and appropriate remedial action *upon notice* of the hostile work environment." (1200a, 1312a (emphasis added).) Before the jury was impaneled, DaimlerChrysler moved to preclude evidence regarding complaints of which the company had never received notice. (345a-360a.) The court denied the motion but promised a "limiting instruction" with respect to employer responsibility where actual notice is absent, and constructive notice is claimed. (364a-372a.) DaimlerChrysler proposed a special jury instruction providing that it was Ms. Gilbert's obligation to show that she acted reasonably in failing to take advantage of those preventive and corrective opportunities provided by the company, citing *Chambers*. (1184a-1186a.) The request was denied. (1186a-1188a.) As it turned out, the jury became concerned over this very issue in light of verdict form question No. 2, which read: "Upon notice, did defendant DaimlerChrysler adequately investigate and take prompt and appropriate remedial action." (1314a.) The question the jury propounded was: "Does question No. 2 need to be looked

[Footnote continued on next page]

312. "[A] hostile work environment . . . can only be attributed to the employer if the employer failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment," and "it is the plaintiff's burden" to make that showing." *Id.* at 313, 316. The core value of Elliott-Larsen is the prohibition of intentional discrimination. Here, however, DaimlerChrysler has been held liable for what it "should have known" Ms. Gilbert's co-workers were allegedly doing. This approach wrongly equates ignorance of harassment with intentional discrimination. *See Blankenship v. Parke Care Ctrs.*, 123 F.3d 868, 872-75 (6th Cir. 1997).

Harassment is not the employer's "fault," under common law agency or negligence principles, unless a reasonable fact-finder can conclude that the employer had actual knowledge of the harassment and failed to act reasonably in response. As the Sixth Circuit has stated in construing Elliott-Larsen, "the purpose of providing notice to the employer is to enable the employer to investigate and take prompt and appropriate remedial action." *Hartleip v. McNeilab, Inc.*, 83 F.3d 767, 776-77 (6th Cir. 1996) (rejecting plaintiff's claim because of failure to provide timely notice). "Because [the plaintiff] did not tell [her supervisor] about the harassment until *months after the conduct had already ceased* . . . she did not provide [the defendant] with the opportunity to take remedial action." *Id.* at 777 (emphasis added).[14] Only timely and adequate notice can reasonably serve to avoid or to minimize additional damage and to provide the employer with an

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[Footnote continued from previous page]
at on each incident separately, or together as a whole." (1314a.) Instead of giving a specific instruction, the trial court merely repeated its earlier instruction. (1315a.)

[14] *See Coates v. Sundor Brands, Inc.*, 164 F.3d 1361 (11th Cir. 1999) (plaintiff did not adequately apprise defendant of dimensions of problem); *EEOC v. Barton Protective Servs. Inc.*, 47 F. Supp. 2d 57, 61 (D.D.C. 1999) ("a reasonable person in [plaintiff's] place would have come forward early enough to prevent [the] harassment from becoming 'severe or pervasive'"; eleven months was unreasonable (quoting *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999)).

opportunity to prevent conduct from escalating to a point where it is actionable. *See, e.g.*, *Barton Protective Servs.*, 47 F. Supp. 2d at 61.

Where, as here, an employer has in place an anti-harassment policy with a known procedure for reporting complaints of sexual harassment, an employee should be required to use that procedure, absent a strong showing that the procedure was not effective. Otherwise the result is exactly what happened here, where Ms. Gilbert elected not to use the procedure for the overwhelming majority of alleged incidents—even though on occasion she *did* use the policy and knew it to be effective—and instead resorted to a vague "constructive notice" theory that resulted in massive liability even though DaimlerChrysler did not actually know of the unreported incidents and thus was not at fault. Requiring employees to use known and effective complaint reporting procedures leads employers to adopt policies that protect employees, encourages employees to report offensive conduct promptly, and enables employers to take prompt and adequate remedial action to provide a harassment-free environment for all workers. Any other approach to notice renders nugatory employers' reporting procedures, deprives employers of any opportunity to remediate harassment and to avoid liability, and undercuts the notice principles in *Chambers* and other cases. In the alternative, if the Court elects to apply a doctrine of "constructive notice"—*i.e.*, notice through means other than reports by the plaintiff—then this Court should hold that the standard for such notice is very high, such that a plaintiff bears the burden of proving that the employer's higher management must have known that the plaintiff was experiencing severe and pervasive sexual harassment. Because DaimlerChrysler had neither actual nor constructive notice of the unreported alleged incidents, those incidents cannot give rise to liability against the company.

1. DaimlerChrysler Did Not Have Actual Notice Of Sexual Harassment

The notice inquiry focuses on whether the employer was "aware of a substantial probability that sexual harassment was occurring." *Chambers*, 463 Mich. at 319. The only incidents of which DaimlerChrysler even arguably had timely and adequate actual notice were the six incidents that Ms. Gilbert reported through the complaint procedure. Her alleged "reports" via deposition testimony long after the purported incidents were inadequate as a matter of law to constitute notice. Thus, Ms. Gilbert's claim must be limited to the six reported incidents, and those incidents could not provide DaimlerChrysler with notice of a "substantial probability" that she was experiencing sexual harassment.

a. Ms. Gilbert's Failure To Use DaimlerChrysler's Complaint Reporting Procedure Should Bar Her From Relying On Unreported Incidents In Support Of Her Claim

This Court should make clear that harassment cannot be attributed to an employer unless the plaintiff promptly reports the conduct that she considers to be sexually harassing and cooperates fully with the employer's investigation, or proves that extraordinary circumstances existed that made it reasonable for her not to do so. *See Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1014 (7th Cir. 1997) (affirming directed verdict for employer where plaintiff failed to assist in employer's investigation).[15] DaimlerChrysler acted to protect Ms. Gilbert and other employees by creating a complaint process, widely known and acknowledged to be effective by Ms. Gilbert herself. Indeed, she used that procedure to report six incidents, and DaimlerChrysler promptly acted on those reports. *See supra* pages 6-9 and *infra* pages 35-39. She offered no valid reason

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[15] Federal decisions construing Title VII are "highly persuasive" in interpreting Elliott-Larsen, *Meyer v. City of Center Line*, 242 Mich. App. 560, 569, 619 N.W.2d 182, 619 N.W.2d 182 (2000), unless some aspect of Title VII plainly differs from Elliott-Larsen. *See Chambers*, 463 Mich. at 313-14.

why she did not use the process contemporaneously to report the other conduct she described at deposition and trial long after it had occurred.[16] A plaintiff must show that she acted reasonably in bypassing the complaint policy or in failing to timely alert the employer to the offending conduct before the employer's response can be the subject of potential liability.

An employer with a designated channel for receiving complaints is entitled to rely on employees to report problems. "[A]n employer is insulated from liability under Title VII for a hostile environment sexual harassment claim premised on constructive knowledge of the harassment when the employer has adopted an anti-discrimination policy that is comprehensive, well-known to employees, vigorously enforced, and provides alternate avenues of redress." *Farley v. Am. Cast Iron Pipe Co.*, 115 F.3d 1548, 1554 (11th Cir. 1997). *See also Parkins v. Civil Constructors of Ill.*, 163 F.3d 1027, 1035 (7th Cir. 1998) ("An employer's legal duty in co-employee harassment cases will be discharged if it takes reasonable steps to discover and rectify acts of sexual harassment by its employees."); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 110 (3d Cir. 1994) ("In sum, we hold that an effective grievance procedure—one that is known to the victim and that timely stops the harassment—shields the employer from Title VII liability for a hostile environment. . . . A policy known to potential victims also eradicates apparent authority the harasser might otherwise possess."); *Curry v. District of Columbia*, 195 F.3d 654, 660 (D.C. Cir. 1999). Ms. Gilbert's failure to use the procedure precludes her from asserting liability against DaimlerChrysler based on unreported incidents.

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[16] Ms. Gilbert knew the procedure was effective but justified her failure to contemporaneously report, and/or name the men whom she "knew" to be the offenders, by saying she believed they would be fired. (944a-947a.)

b. This Court Should Make Clear That Deposition Testimony Months Or Years After Alleged Incidents Is Not Timely And Adequate Actual Notice

The lower courts held that DaimlerChrysler had notice of allegations that Ms. Gilbert waited to disclose in depositions and even trial testimony given at least several months—and, in most instances, years—after the fact. As a matter of law, she could not meet her legal burden of providing adequate notice when she circumvented the complaint procedure in this fashion and waited so long to report the conduct that DaimlerChrysler was deprived of an opportunity to remediate. *See Burrell v. Crown Cent. Petroleum, Inc.*, 121 F. Supp. 2d 1076 (E.D. Tex. 2000) (holding plaintiff's failure to invoke employer's anti-harassment procedures unreasonable as a matter of law where she had previously used grievance procedure and was satisfied with result).

Even if Ms. Gilbert's refusal to use DaimlerChrysler's complaint procedure could be overlooked, however, the ruling below that notice to DaimlerChrysler's attorney during litigation was the equivalent of the adequate notice to "higher management" required by *Sheridan v. Forest Hills Public Schools*, 247 Mich. App. 611, 637 N.W.2d 536 (2001), *leave denied*, 466 Mich. 888, 646 N.W.2d 475 (2002), is inconsistent with *Chambers* and *Sheridan*. *Sheridan* defines an individual whose knowledge is imputable to the employer as "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision making process of hiring, firing, and disciplining the offensive employee" because these "employees are vested by the employer with actual authority to effectuate change in the workplace." 247 Mich. App. at 622-23. The employer's litigation attorney is not an extension of its human resources function. The attorney is not designated by company policy to receive reports of harassment and has no supervisory authority over the employer's personnel. *See, e.g., Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 321 (7th Cir. 1992) (citing *Restatement (Second) of*

Agency § 275 and comment a, in holding that plaintiff's report to supervisor outside her department was not actual notice because receiving and communicating that report was not within the scope of that supervisor's agency). Indeed, an attorney's role in litigation is to defend a client zealously—including cross-examining, challenging, and refuting claims made by an employee who has sued the company for millions of dollars—not to investigate those claims for purposes of remediation.

c. The Six Reported Incidents Cannot Give Rise To Notice Of A Substantial Likelihood Of Sexual Harassment

As discussed below, *see infra* pages 39-43, the standard for establishing sexual harassment—*i.e.*, that it was severe or pervasive—is high, and far above what the record here reflects. For the same reason, there is no possibility that DaimlerChrysler could have been "aware of a substantial probability that sexual harassment was occurring." *Chambers*, 463 Mich. at 319.

2. DaimlerChrysler Did Not Have Constructive Notice Of Sexual Harassment

Contrary to *Chambers* and *Sheridan*, the lower courts allowed Ms. Gilbert to premise liability on not only the six incidents she reported through the complaint procedure, but also the rest of the "15,000" incidents she chose not to report. The courts below allowed all of those allegations into evidence based on a loose and vague theory of constructive notice that has no place where an employer has established a complaint procedure. This Court has never adopted the concept of constructive notice for sexual harassment claims,[17] but even if resort to construc-

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[17] This Court has twice mentioned constructive notice in dictum in cases involving Elliott-Larsen. *See Radtke*, 442 Mich. at 396 n.44 (notice and remediation irrelevant and respondeat superior inquiry bypassed entirely where harasser co-owned business); *Stevens v. McLouth Steel Prods. Corp.*, 433 Mich. 365, 378, 446 N.W.2d 95 (1989) (noting in passing the absence of facts to support actual or constructive notice). Neither case endorsed or clarified the meaning of constructive notice.

tive notice were available notwithstanding DaimlerChrysler's complaint procedure, Ms. Gilbert could not establish that the company had constructive notice of any unreported conduct here.

a. Failure To Use A Complaint Procedure Should Bar Resort To A Theory Of Constructive Notice

The courts below erred in holding that the jury could find DaimlerChrysler had notice based on testimony that the "harassment was harsh and obvious to anyone who worked on the plant floor, including Gilbert's supervisors" (77a), *i.e.*, through "constructive" notice. Because *Chambers* emphasizes the plaintiff's obligation to give notice, constructive notice—often misunderstood as what the employer "should have known"—is becoming a recurring issue in Elliott-Larsen litigation, and it is the talisman that plaintiffs invoke to avoid the consequences of not giving actual notice. In a fault state, such as Michigan, imputed knowledge, like imputed fault, has no place. Instead, actual knowledge is required. Where an employer has in place an effective complaint procedure, an employee's unreasonable failure to use that procedure should prevent the employee from attempting to show notice through any other means. Otherwise, employees will have little incentive to report harassment promptly, employer attempts at remediation will be frustrated, harassment in the workplace will go unabated, and employers will face massive and unanticipated liability in court based on previously unreported allegations.

b. Ms. Gilbert Failed To Prove Constructive Notice

If this Court concludes that the statutory scheme contemplates knowledge through constructive notice, then the Court should clarify that the standard for such notice is demanding, and plaintiffs should be required to show conduct so egregious, concentrated, frequent, open, and notorious that the employer's higher management *must* have known that the plaintiff was being subjected to a campaign of sexual harassment. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 675 (10th Cir. 1988); *Sheridan*, 247 Mich. App. at 622-23 (emphasizing that only knowledge of

higher management employees can be deemed notice to employer). This standard is significantly more exacting than the "should have known" constructive notice standard used here by the courts below.[18] As the court observed in *Adler*, "[i]t would be illogical to require for this inference only the level of pervasiveness essential to make out a hostile environment claim. If this were the rule, knowledge would be attributed to employers in all cases of hostile environment founded on pervasiveness." 144 F.3d at 675. Rather, before knowledge of unreported complaints can be imputed to the employer, the plaintiff must provide "specific" facts supporting a finding that the incidents are "so egregious, numerous and concentrated as to add up to a campaign of harassment." *Id.* at 674-75; *Ford v. West*, 222 F.3d 767 (10th Cir. 2000). In *Sheridan*, for example, the court found four incidents occurring over three years, including a rape and other physical contact, coupled with prior incidents involving different victims, insufficient to establish constructive notice. 247 Mich. App. at 627-28. Thus, a plaintiff who bypassed an employer's complaint procedure would need to show facts inferentially demonstrating actual notice to higher management before the employer could be held liable.

Here, the lower courts applied the wrong standard, and the record cannot support a finding of constructive notice. The lower courts found DaimlerChrysler at fault for not discovering that conduct that is routine between male co-workers on the stressful plant floor was perceived by Ms. Gilbert as gender-based harassment.[19] *But see Madray v. Publix Supermarkets, Inc.*, 208

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[18] In *Blankenship*, Judge Engel questioned the logic of holding the employer liable for co-worker harassment under the "knew or should have known" standard because it "in essence equates *negligent* ignorance of the existence of harassment with *intentional* discrimination." 123 F.3d at 872. Concurring, Judge Merritt observed that "[t]he standard seems to me to be somewhere between 'negligence' and 'intentional wrongdoing.'" *Id.* at 875.

[19] The trial court erroneously held that DaimlerChrysler had notice of *every* unreported incident because it knew of the six incidents Ms. Gilbert reported. (43a-50a.) At argument on the

[Footnote continued on next page]

F.3d 1290, 1300 (11th Cir. 2000) (report inadequate where plaintiff failed to inform management that incident was "only the latest in an on-going pattern of sexually harassing behavior").

The evidence is insufficient to establish actual knowledge by DaimlerChrysler of *any* conduct beyond the six reported incidents. First, the testimony of Ms. Gilbert and two of her co-workers (Lemmerz and Whitenight), which the lower courts viewed as establishing "harsh and obvious" harassment (77a), is so vague and conclusory as to provide no notice at all. *See Quinto v. Cross & Peters Co.*, 451 Mich. 358, 370, 547 N.W.2d 314 (1996) (plaintiff's description of conduct as "'continually' demeaning and humiliating" is insufficient to support finding that the referenced comments were of a type, severity, or duration to create an objectively hostile work environment);[20] *Adler*, 144 F.3d at 674 ("Vague, conclusory statements do not suffice to create a genuine issue of material fact.").

Second, the conduct that Ms. Gilbert and her witnesses claimed was "open and obvious" involved the types of name-calling, rude comments, and lack of cooperation that commonly occur between male co-workers within the plant. Additionally, some of Ms. Gilbert's difficulties with her co-workers were attributable, even by her account, to issues other than her gender.[21]

[Footnote continued from previous page]
motion to exclude unreported incidents, the trial court recognized that Ms. Gilbert had a duty to advise the company of the types of harassment she was experiencing so that it would appreciate the full dimension of her alleged problems. (365a-366a.) The trial court was of a different view by the time it issued its written opinion after trial.

[20] DaimlerChrysler requested a special jury instruction (No. 5) reflecting the *Quinto* standard. (115a.)

[21] The allegation cited by the lower courts concerning Ms. Gilbert's toolbox being blocked is an example. (60a.) Ms. Gilbert conceded at trial that *everyone's* toolbox is blocked at some point when people set materials where they should not be. When it happened to her, however, she chose to take it personally. (898a-899a.)

Working in a manufacturing plant is often stressful, particularly for millwrights responsible for repairing line breakdowns. Employee disagreements about how to complete repairs often erupt, and it is not uncommon in such moments to hear the exchange of crude and vulgar language or "shop talk." (512a, 1125a, 1161a-1162a, 1173a.) One of Ms. Gilbert's co-workers (Lemmerz) testified that he has been in the same position as Ms. Gilbert, "being hammered day after day by fellow co-workers who do not want to cooperate with you, it just brings you to the point where you don't want to go to work." (712a.) According to Ms. Gilbert, the co-workers with whom she allegedly experienced difficulties also "messed with" another co-worker (Mike DiSiarsic) in the same manner. (955a-956a.) And the two co-workers (Jack Negoshian and Jerry Ernat) whom Ms. Gilbert and two of her witnesses (Lemmerz and Whitenight) identified as having engaged in the "harsh and obvious" conduct (949a-950a, 1445a) were widely perceived as outspoken, argumentative, ornery, easily set off by men or women, and known to use vulgarities generally, even with supervisors. (723a, 1143a-1147a.)

Ms. Gilbert's difficulties were further complicated, in her opinion, by the resentment certain employees harbored because she had apprentice training whereas they learned their skill on the job. (791a-793a, 808a.) When she complained to a union steward early in her career that she was not getting the respect of other journeymen, she was advised that when working with experienced employees, "if they want to do a job one way, and you want to do it the other way, they are not going to take your way. They are going to do it the way they have been doing it for thirty years." (1170a-1171a.) But Ms. Gilbert did not alter her approach. As she testified, her working style created ill will because many of her co-workers "liked to milk the job." They would "take their time and, you know, go as slow as possible and I like to do the job and get it done. And so that caused animosity." (808a-809a.)

As the record demonstrates, many factors other than gender plainly contributed to the co-worker friction Ms. Gilbert experienced. Although gender biases may have been an issue in addition to the more obvious causes, Ms. Gilbert cannot expect management to simply "figure that out for itself" when she fails to raise such a concern. *See Madray*, 208 F.3d at 1300. Ms. Gilbert testified that she complained from time to time to certain supervisors about her co-workers' conduct, but she did not complain about *discrimination*. And her co-worker witnesses (Lemmerz and Whitenight) acknowledged that they never told supervision that they believed she was being mistreated because of gender. (576a, 724a, 729a.) Thus, even if supervision observed Ms. Gilbert being subjected to the types of aggressive interactions that routinely occur on the plant floor, it was not self-evident that such conduct was based on *gender*.[22]

A third reason for Ms. Gilbert's failure to meet the "concentrated, numerous and egregious" standard is that the record did not establish a pattern of "daily" co-worker friction after 1993. The great bulk of the supposedly "open and obvious" conduct described by Ms. Gilbert and her witnesses (Lemmerz, Whitenight, and Gupton) was attributed to two co-workers (Negoshian and Ernat), yet her daily contact with these individuals ceased as of June 1993. (1323a-

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[22] In several instances, the lower courts inappropriately depicted gender-neutral workplace events as discriminatory. For example, the Court of Appeals wrote that "[t]he journey [sic] millwrights refused to be partnered with Gilbert, which left her to be partnered with apprentices." (59a.) The record, however, clearly shows that Ms. Gilbert's pairing for one year (1992-1993) with an apprentice was not the result of the journeymen millwrights refusing to be partnered with her. During that time, she was partnered with an apprentice because her area coordinator had only three millwrights reporting to him, including Ms. Gilbert, despite his efforts to secure additional help. Because the other two millwrights had been partnered together for years and worked well together, the area coordinator chose not to separate them. Thus, Ms. Gilbert was assigned to work with an apprentice during that time. Had she found this arrangement unacceptable, she could have filed a grievance, but she did not. (908a-910a, 1093a-1094a.) Ms. Gilbert offered no evidence to the contrary.

1324a, 1335a-1343a, 1446a.) Thereafter, she was on a different shift from either of those individuals, rendering daily contact impossible. (1446a.)

The lower courts essentially held that once DaimlerChrysler was apprised of a single alleged act of harassment, it had knowledge of all prior and subsequent acts, regardless of when those acts occurred in relation to, or how different they may be from, the acts of which the company had actual notice. To require this sort of clairvoyance would be to impose on employers an unreasonable and unattainable standard of care, one akin to strict liability rather than the concept of fault recently emphasized by this Court in *Chambers*. The lower courts misconceived the respective responsibilities of employee and employer "[i]n the absence of an Orwellian program of continuous surveillance, not yet required by the law." *Zimmerman v. Cook County Sheriff's Dep't*, 96 F.3d 1017, 1019 (7th Cir. 1996) (Posner, J.); *Coates*, 164 F.3d at 1365-66.

B. Ms. Gilbert Failed To Establish That DaimlerChrysler Did Not In Good Faith Take Prompt And Adequate Remedial Action

Aside from not giving timely and appropriate notice of the overwhelming majority of the incidents described at trial, Ms. Gilbert failed to meet her burden under Elliott-Larsen of showing that DaimlerChrysler "failed to take prompt and adequate remedial action." *Chambers*, 463 Mich. at 316.[23] "[T]he relevant inquiry . . . is whether the action reasonably served to prevent future harassment," *id.* at 319, although a response need not be successful to be reasonable.

As the court noted in *Blankenship*, "when an employer responds to charges of *co-worker* sexual harassment, the employer can be liable only if its response manifests indifference or unreasonableness. . . . The act of discrimination by the employer in such a case is not the harass-

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[23] DaimlerChrysler submitted numerous objections to the trial court's jury instructions regarding liability and objected to the trial court's failure to give the instructions sought by DaimlerChrysler. (1174a-1189a.)

ment, but rather the inappropriate response to the charges of harassment." 123 F.3d at 873 (citations omitted). "[T]he employer's good-faith response was entirely sufficient to escape liability." *Id.*

In *Scarberry v. ExxonMobil Oil Corp.*, — F.3d —, No. 02-6105, 2003 WL 2008201 (10th Cir. May 2, 2003), the court affirmed summary judgment in the employer's favor based on its adequate response. "The test is whether the employer's response to each incident of harassment is proportional to the incident and reasonably calculated to end the harassment and prevent future harassing behavior." *Id.* at *3. "ExxonMobil appropriately responded to each of the incidents . . . , thereby protecting itself against liability for negligence." *Id.* As the court noted, "if we required employers to impose discipline without investigation or to impose excessive discipline, 'employers would inevitably face claims from the other direction of violations of due process rights and wrongful termination.'" *Id.* at *5 (quoting *Adler*, 144 F.3d at 677).

Thus, the fact that a plaintiff can posit other possible responses in no way "manifest[s] an indifference that amounted to discrimination." *Maples v. Gen. Motors Corp.*, No. 97-73524, 1999 WL 1068588, at *10 (E.D. Mich. Apr. 29, 1999). *See also Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999) ("Sometimes, as in this case, an employer's reasonable attempt to prevent future harm will be frustrated by events that are unforeseeable and beyond the employer's control. *The law requires an employer to be reasonable, not clairvoyant or omnipotent.*" (emphasis added)); *Reese v. Meritor Auto., Inc.*, 113 F. Supp. 2d 822 (W.D.N.C. 2000).

The record establishes that DaimlerChrysler took extensive remedial efforts designed to prevent future acts of misconduct in response to each of Ms. Gilbert's six reported incidents of sexual harassment, five of which involved anonymous acts. Formal discipline was imposed in connection with the sixth complaint, the only one involving an identified perpetrator.

The record stands in stark contrast to the lower courts' depiction of DaimlerChrysler's remedial efforts. For example, the Court of Appeals stated that "the jury in this case could have found compelling Gilbert's evidence that she would die an untimely death because of the effects of the harassment that Chrysler knew existed and did nothing to stop." (94a.) The court ignored the unrebutted evidence[24] concerning the investigatory efforts DaimlerChrysler undertook every time Ms. Gilbert reported an incident, treating her lawyer's "arguments" as evidence.[25] In addition to the testimony of no fewer than six witnesses outlining DaimlerChrysler's remediation, even Ms. Gilbert admits that the company encouraged her to come forward, approached her to obtain statements, interviewed the men on the floor, apologized for the incidents, patrolled her work area, and more. Ms. Gilbert admitted that she did not name the employees she believed were responsible because she feared that the company would summarily fire them—*i.e.*, that the company would vigorously enforce its anti-harassment policy.

The record further confirms that, although repeatedly asked in connection with each reported incident, Ms. Gilbert failed to share not only her certitude as to the identity of her alleged harassers, but any other incident of what she would later describe as constant harassment. She was repeatedly asked, and she repeatedly responded, that she did not know who was responsible. (460a, 522a, 545a, 1350a-1351a.) When specifically asked by human resources if there were

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[24] Ms. Gilbert did not contradict the testimony of DaimlerChrysler's witnesses regarding the company's remedial efforts. She simply claimed to lack knowledge of the company's actions. (*See, e.g.*, 821a.)

[25] Despite exhaustive testimony to the contrary, Mr. Fieger repeatedly stated in declamatory questions to witness after witness that not a single person from DaimlerChrysler did anything to investigate Ms. Gilbert's claims. (*See, e.g.*, 487a, 508a.) If a witness refused to agree, Mr. Fieger would immediately attack the witness for not having written documentation, suggesting that if remediation efforts were not documented, they did not happen. (503a, 1143a.) Although Mr. Fieger's statements in the jury's presence about DaimlerChrysler's remediation efforts were obviously false, the lower courts treated them as though they were fact.

other incidents of harassment not yet reported, Ms. Gilbert did not disclose any of the additional alleged conduct subsequently detailed in her deposition and trial testimony. (562a-563a.) Ms. Gilbert cannot be permitted to impose massive, record-setting liability upon DaimlerChrysler for not taking "enough" remedial action when she purposely interfered with the company's efforts to protect her and to prevent harassment. *See Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969 (5th Cir. 1999) (plaintiff misled investigators and thwarted her employer's efforts to remedy past misconduct and to prevent future misconduct by failing to disclose harassment during the investigation).

Given the anonymous nature of most of the reported incidents and Ms. Gilbert's refusal to cooperate fully with the company's investigatory efforts, DaimlerChrysler's response more than satisfied its obligation to make a "good faith" effort to remediate each complaint reported by Ms. Gilbert. *See, e.g., Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 633 (8th Cir. 2000) (employer took prompt remedial action in response to plaintiff's complaints about pornographic computer program in her work area by interviewing employees to try to determine who was responsible for installing the program, consulting with plaintiff, reiterating sexual harassment policy to employees, and offering plaintiff a transfer to different department); *Fred v. Wackenhut Corp.*, 860 F. Supp. 1401, 1406 (D. Neb. 1994) (employer took prompt remedial action in response to harassment by unknown perpetrator by meeting with plaintiff's co-workers and circulating memorandum admonishing them to cease harassment), *aff'd*, 53 F.3d 335 (8th Cir. 1995); *Brittell v. Dep't of Correction*, 717 A.2d 1254, 1266-67 (Conn. 1998) (employer took adequate remedial measures to end harassment by unknown perpetrators where employer questioned persons who might have information and warned employees that sexual harassment would not be tolerated, and plaintiff had ready access to supervisory personnel in case of further harassment);

Smith v. ITT Corp., 918 F. Supp. 304, 307 (D. Ariz. 1995) (employer's response adequate where it removed offensive graffiti and warned employees that such conduct would not be tolerated).

Thus, because Ms. Gilbert failed to carry her burden of proving that DaimlerChrysler failed to take good-faith remedial actions, she cannot establish fault.

C. The Alleged Conduct Was Not Severe Or Pervasive

In light of Ms. Gilbert's failure to provide timely and adequate notice of all but six incidents of alleged misconduct, as well as her failure to prove that DaimlerChrysler did not take prompt and effective remedial actions upon receiving notice, there is nothing left of her sexual harassment claim. Even if those six reported and remediated incidents are considered, however, they fall far short of demonstrating severe or pervasive sexual harassment.

1. Alleged Incidents That Either Were Not Promptly Reported To An Employer Or Were Remediated Adequately Cannot Give Rise To Liability

The necessary consequence of the notice and remediation inquiries is that where an employee has failed to give timely notice of an alleged incident, or where an employer has adequately remediated a situation upon receiving notice, the employer is not at fault for such incidents under *Chambers* and *Sheridan*. If the employer is not at fault, then an employee cannot rely on such incidents in support of a claim of sexual harassment. Here, when the "15,000" incidents asserted at trial are reduced by the 14,994 *unreported* incidents and the six *adequately remediated* incidents, the unavoidable conclusion is that there is not even one alleged incident for which DaimlerChrysler can be considered at fault. Thus, Ms. Gilbert cannot establish that DaimlerChrysler is responsible, under the doctrine of respondeat superior, for severe or pervasive sexual harassment under the third, fourth, and fifth elements of a claim under Elliott-Larsen.

2. The Six Reported Incidents, Occurring Over Seven Years And Involving No Allegation Of Propositioning Or Physical Touching, Are Not Severe Or Pervasive

This case also presents this Court with an opportunity to declare that for harassment to be unlawful, "it must be sufficiently *severe or pervasive* 'to alter the conditions of . . . employment and create an abusive working environment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399 (1986) (emphasis added). To date, this Court has not elaborated on this standard, but federal cases in this area are instructive.[26] Where, as here, there is no loss of job benefits, the law "requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment." *Jones v. Flagship Int'l*, 793 F.2d 714, 720 (5th Cir. 1986). The six incidents at issue fall far short of this standard for at least two reasons: they are too infrequent to be "pervasive" and too mild to be "severe."

First, federal appellate courts throughout the country have routinely held that employers are entitled to judgment where allegations involve incidents occurring far more frequently than six in a seven-year span. For example, in *Bowman v. Shawnee State Univ.*, 220 F.3d 456 (6th Cir. 2000), the Sixth Circuit concluded that five "serious" incidents—including three that "were not merely crude, offensive, and humiliating, but also contained an element of physical invasion"—over a five year time span were not severe or pervasive. *Id.* at 464 (quotation omitted). "While the allegations are serious, they do not constitute conduct that is pervasive or severe." *Id.*

Likewise, in *Alfano v. Costello*, 294 F.3d 365 (2d Cir. 2002), the plaintiff alleged twelve incidents over four years. The Second Circuit observed that "[i]n all, the incidents were infrequent and episodic; half or more of them lacked any sexual overtone; and those that did have a

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[26] This Court has looked to federal interpretations of the "severe or pervasive" standard in construing Elliott-Larsen. *See Quinto*, 451 Mich. at 370 n.9.

sexual overtone were difficult for an employer to remedy because they were largely anonymous." *Id.* at 380. With respect to the incidents that had an explicitly sexual dimension, the court determined that "[n]o reasonable fact finder could say that as a result of these five incidents over a four-year period, [plaintiff's] workplace was 'permeated with discriminatory intimidation, ridicule, and insult.'" *Id.* (citation omitted). The court held that these incidents were "infrequent and episodic," and "too few, too separate in time" to constitute pervasive harassment. *Id.* at 379-80.[27]

Second, courts have rejected plaintiffs' claims where the alleged conduct is far more serious than five anonymously placed sexually-oriented items and a boorish comment. For example, in *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000), the Ninth Circuit affirmed summary judgment in favor of the employer where the plaintiff alleged that a coworker had placed his hands on her stomach, made comments about its softness and sexiness, and then forced his hands underneath her brassiere to fondle her breasts. *Id.* at 921, 923-27. The court held that this incident was insufficient to constitute a hostile environment even though the co-worker was later jailed for four months as a result of these incidents. *Id.* at 922.

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[27] *See also Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1997) (reversing plaintiff's verdict because sexual comments by male employees twice per week for four months did not create an objectively hostile work environment: "Although the verbal comments were offensive and inappropriate, and the record suggests that defendant's employees did not always conduct themselves in a professional manner, Title VII was not designed to purge the workplace of vulgarity." (quotation omitted)); *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1366 (10th Cir. 1997) (rejecting plaintiff's claim based on five incidents in sixteen months); *Penry v. Fed. Home Loan Bank of Topeka*, 155 F.3d 1257, 1261-63 (10th Cir. 1998) (in a three-year period, harasser made remarks concerning plaintiff's brassiere strap and underclothing and whether she had sexual dreams; claimed sexual conquest of another woman employee; made pornographic architectural analogies; and took plaintiff to a Hooter's restaurant on business travel; six incidents held insufficient); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (nine allegedly unlawful incidents, spread over seven months, could not reasonably be thought to constitute sexual harassment).

Similarly, in *Saxton v. American Telephone & Telegraph Co.*, 10 F.3d 526 (7th Cir. 1993), the court affirmed summary judgment in favor of the employer where the plaintiff's supervisor made sexual advances on two occasions, rubbed his hand up her thigh, kissed her, and lurched at her from behind bushes. *Id.* at 528. The plaintiff contended that, after she rebuffed his advances, the supervisor "refused to speak with her, treated her in a condescending manner, and teased her about her romantic interest in a coworker." *Id.* at 529. Rejecting her claim, the court held that "[a]lthough [the supervisor's] conduct was undoubtedly inappropriate, it was not so severe or pervasive as to create an objectively hostile work environment." *Id.* at 534-37.[28]

Thus, the incidents that Ms. Gilbert reported to DaimlerChrysler pursuant to the company's complaint procedure cannot as a matter of law constitute severe or pervasive harassment.

Even if Ms. Gilbert had timely reported *all* allegations to DaimlerChrysler, they would not have provided notice that she was experiencing *sexual* harassment, as opposed to *gender* harassment. As the Attorney General has argued to this Court in *Haynie v. State*, No. 120426 (argued Dec. 10, 2002; decision pending), Elliott-Larsen does not ban unpleasantness based on gender that does not rise to the level of adverse employment action. Instead, the statute makes clear that a plaintiff can recover without establishing adverse employment action—such as termination, demotion, or reduction in pay—*only* where the conduct involves "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a

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[28] *See also Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 872, 874 (5th Cir. 1999) (several incidents over a two-year period, including comment "your elbows are the same color as your nipples," another comment that plaintiff had big thighs, repeated touching of plaintiff's arm, and attempts to look down plaintiff's dress, insufficient to support hostile work environment claim); *Adusumilli v. City of Chicago*, 164 F.3d 353, 357, 361-62 (7th Cir. 1998) (holding conduct insufficient to support hostile environment claim when employee teased plaintiff, made sexual jokes aimed at her, told her not to wave at police officers "because people would think she was a prostitute," commented about low-necked tops, leered at her breasts, and touched her arm, fingers, or buttocks on four occasions).

sexual nature." MCL § 37.2103(i). Where, as here, the allegations were not of a "sexual nature," in the sense the Legislature plainly intended as shown by the examples listed in the definition of sexual harassment, the plaintiff has not been sexually harassed under Elliott-Larsen.[29] Here, Ms. Gilbert alleges, at most, eleven incidents over the course of seven years with even arguably a sexual dimension to them: the anonymous placement of a small number of offensive writings in the workplace, coupled with a few boorish comments indisputably not intended as sexual propositions.[30] These alleged incidents could not possibly have provided DaimlerChrysler with notice that Ms. Gilbert was experiencing "sexual harassment" under Michigan law.

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[29] If this Court holds in *Haynie* that gender harassment is not actionable under Elliott-Larsen, there is some question whether this Court would also thereby need to overrule *Koester v. City of Novi*, 458 Mich. 1, 580 N.W.2d 835 (1998), which held that harassment based on a plaintiff's pregnancy, without an overtly sexual component, is actionable as sexual harassment. Although DaimlerChrysler takes the position that the dissenting opinion in that case sets forth the appropriate analysis under Elliott-Larsen and that *Koester* should be overruled, this Court also has the option of limiting *Koester* to its facts and thereby continuing to permit claims for pregnancy harassment but precluding claims for gender harassment outside the pregnancy context.

If this Court overrules *Koester*, the decision to do so should be applied to DaimlerChrysler's appeal in this case as well. "[T]he general rule is that judicial decisions are given full retroactive effect," subject only to exceptions needed to avoid "injustice." *Pohutski v. City of Allen Park*, 465 Mich. 675, 696, 641 N.W.2d 219 (2002). The *Koester* ruling is not a long-settled precedent upon which parties, including the parties to this case, could have relied in ordering their conduct. Indeed, overruling *Koester* would merely give effect to the plain language of Elliott-Larsen as enacted by the Legislature. Moreover, because federal law arguably prohibits gender harassment, and because most employers have prohibited and will continue to prohibit gender harassment in the workplace, overruling *Koester* will have minimal, if any, adverse effects on the administration of justice or on how employers and employees interact. Thus, under *Pohutski*, a decision in *Haynie* overruling *Koester* should be applied here as well. 465 Mich. at 696. Indeed, this Court applied *Chambers* retroactively in *Coleman v. State*, 463 Mich. 939, 620 N.W.2d 851 (2000).

[30] In tallying every alleged harassing act that has any "sexual" overtone—irrespective of whether such incidents were reported—DaimlerChrysler has identified the following eleven allegations: the six reported acts, the co-worker who commented on holding a ladder when Ms. Gilbert wore a dress to work, finding a *Penthouse* magazine on her toolbox, finding an article entitled "Why Men Have So Many Sperm" on the picnic table near her beverage, finding a

[Footnote continued on next page]

II. The Blatant Misconduct Of Ms. Gilbert's Counsel Requires, At A Minimum, Reversal And A New Trial

To make up for the fundamental deficiencies in Ms. Gilbert's case, Mr. Fieger was forced to resort to theatrics and shenanigans at trial. From the start of the trial through closing argument, Mr. Fieger whipped the jury into an emotional frenzy with highly improper questions and argument, continually exceeding the bounds of legitimate advocacy in numerous ways. He asked questions laden with inflammatory rhetoric and mischaracterizations of the evidence, falsely claiming that DaimlerChrysler had "done nothing to stop the harassment" (which he repeatedly described as "relentless," "unrelenting," or "daily"), and accusing defense counsel—in front of the jury and without any good faith basis—of lying and presenting evidence designed to mislead and to deceive. He concealed from and misrepresented to the jury the nature of his close relationship with his key witness, Mr. Hnat. This edifice of misconduct was topped with a closing argument that appealed directly to the passion and prejudice of the jury, including pleas for punitive damages and attacks on DaimlerChrysler's German nationality. This misconduct fundamentally and irremediably tainted the trial, thus mandating a new trial on all issues. *See, e.g.*, *Burns v. City of Detroit*, — Mich. —, 658 N.W.2d 468, 468 (2003) ("New trials limited to damages are disfavored, and normally ordered only when liability is clear." (citation omitted)).

Mr. Fieger's misconduct unmistakably brings this case under the rule of *Reetz v. Kinsman Marine Transit Co.*, 416 Mich. 97, 330 N.W.2d 638 (1982), which contains its own standard of review. In *Reetz*, this Court considered and rejected the argument that appellate courts are without power to address attorney misconduct in the absence of an objection. "Where improper con-

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hose assembled in the shape of a penis, and a co-worker asking her "how is your love life." *See supra* pages 6-12.

duct . . . influences the outcome of a trial, an appellate court may reverse although the appellant's attorney did not seek to cure the error." *Id.* at 102. "Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action." *Id.* at 103. This Court reached a conclusion that applies to this case word for word:

> We believe the record in the instant case shows a deliberate course of conduct on the part of counsel for plaintiff aimed at preventing defendant from having a fair and impartial trial. We think the course of misconduct was so persistently followed that a charge of the court in an effort to obviate the prejudice would have been useless.

Id. at 111-12 (quotation omitted). Indeed, this Court observed that "[a]n appellate court should not require that an appellant 'demonstrate affirmative prejudice' to his cause." *Id.* at 103 n.8. "If on the record an appellate court 'is not able to say that the jury was not diverted from the merits . . . , nor could [they] say that the "mischief done" was cured by the judge's efforts', then a new trial should be ordered." *Id.* (quoting *Wayne County Bd. of Rd. Comm'rs v. GLS LeasCo, Inc.*, 394 Mich. 126, 139, 229 N.W.2d 797 (1975)). "Thus," this Court concluded, "although no objection was made to these comments, a new trial should be ordered." *Id.* at 112.

In the event that this Court does not hold that DaimlerChrysler is entitled to judgment notwithstanding the verdict, the misconduct here requires a new trial on all issues.

A. Ms. Gilbert's Counsel Improperly Sought A Punitive Verdict

Mr. Fieger—over DaimlerChrysler's objection (1274a-1275a)—used classic punitive damage rhetoric in seeking a symbolic $140,000,000 verdict. He was allowed to argue that the jury should impose damages as the "conscience of the community" (1215a), to express their outrage, and to deter DaimlerChrysler instead of to compensate Ms. Gilbert. (1268a (telling jury to "ring the bell loud enough and high enough" so that the company would "stop" and this would "never, ever, ever, ever happen again").) Mr. Fieger asked the jury to return a verdict that would

achieve the goals of punitive damages, "which are intended to punish the defendant and to deter future wrongdoing" and serve not to compensate but as "an expression of [the jury's] moral condemnation." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 121 S. Ct. 1678 (2001).[31] The jury did just that.

Michigan law, however, has long forbidden juries to assess damages in order to punish. Except where a statute expressly allows recovery of "exemplary" damages, all damages for mental distress are purely compensatory. *See Eide v. Kelsey-Hayes Co.*, 431 Mich. 26, 51-57, 427 N.W.2d 488 (1988). In *Eide*, this Court unanimously held that the Legislature's decision not to include mention of exemplary damages in the Elliott-Larsen Act meant that only compensatory damages for mental distress can be recovered under the Act. To allow a verdict with an unmistakably punitive dimension to stand would therefore violate the remedial scheme established by the Legislature.[32] *See generally* Victor E. Schwartz and Leah Lorber, *Twisting the Purpose of*

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[31] *See also Fisher v. McIlroy*, 739 S.W.2d 577, 582 (Mo. Ct. App. 1987) (affirming grant of new trial: "A closing argument to a jury that the jury could, by its verdict, speak out about its feelings . . . and that the jury could send a message . . . through its verdict is viewed as injecting the issue of punitive damages into a case through the argument, even though such damages had not been pled."); *Maercks v. Birchansky*, 549 So. 2d 199, 199 (Fla. Dist. Ct. App. 1989) (reversing compensatory damages award where counsel made "conscience of the community" and "send a message" arguments in case not involving punitive damages); *Halftown v. Triple D Leasing Corp.*, 453 N.Y.S.2d 514 (App. Div. 1982) (same); *Smith v. Courter*, 531 S.W.2d 743, 745 (Mo. 1976) (affirming new trial based on "speak out" and "conscience of the community" arguments: "[J]uries cannot be told directly or in effect that they may consider punishment or deterrence . . . unless the pleadings, evidence and instructions warrant the separate submission of punitive damages under the law. To do otherwise, would eliminate the distinction between compensatory and punitive damages . . . ."), *overruled on other grounds by Tune v. Synergy Gas Corp.*, 883 S.W.2d 10 (Mo. 1994); *Vanskike v. ACF Indus., Inc.*, 665 F.2d 188, 210 (8th Cir. 1981) (reversing verdict where punitive damages unavailable, but closing argument mentioned both punishment and deterrence).

[32] Arguments of counsel designed to "'inject issues into the trial broader than those pled and brought out by the testimony'" are plainly improper in Michigan. *Kubisz v. Cadillac Gage Tex-*

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Pain and Suffering Awards: Turning Compensation Into "Punishment", 54 S.C. L. Rev. 47, 68 (2002) ("Pain and suffering damages are intended to compensate the plaintiff for past and future pain and suffering and anguish. They should not be twisted into a covert punitive damages substitute and provide the next oil well for 'jackpot justice.'... Evidence of purported corporate wrongdoing is not relevant to establish the appropriate amount of compensation ....").

"[P]arties are entitled to a fair trial on the merits of the case, uninfluenced by appeals to passion or prejudice." *GLS LeasCo*, 394 Mich. at 131. The United States Court of Appeals for the Fifth Circuit, among other courts, has recognized the improperly inflammatory nature of arguments inviting the jury to act as the "conscience of the community." "This us-against-them plea can have no appeal other than to prejudice by pitting 'the community' against" a defendant, and "[s]uch argument is an improper distraction from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial." *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238 (5th Cir. 1985) (reversing jury verdict based on "conscience of the community" argument).

B. Ms. Gilbert's Counsel Improperly Attacked DaimlerChrysler's Nationality And Corporate Status And Appealed To Ethnic Prejudices

Here, the pleas by Ms. Gilbert's counsel to return a verdict based on factors other than compensation were augmented by blatant attacks on DaimlerChrysler for supposedly being a large, insensitive corporation (788a-790a, 1122a-1123a, 1152a-1154a), as well as by only slightly veiled attacks on the company's German nationality and forced and gratuitous references to the Holocaust and concentration camp survivors. The multiple references to Germany, coupled with the repeated comparison of Ms. Gilbert to the "people of Israel," were obviously inten-

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tron, Inc., 236 Mich. App. 629, 642, 601 N.W.2d 160 (1999) (quoting *Joba Constr. Co. v. Burns & Roe, Inc.*, 121 Mich. App. 615, 637, 329 N.W.2d 760 (1982)).

tional. According to Mr. Fieger, DaimlerChrysler was the evil German corporation that inflicted "tyranny," "corporate sponsored torture," and "brutal, brutal . . . abuse" upon Ms. Gilbert, who in turn suffered "unspeakable horrors" just like those experienced by "concentration camp survivors," horrors that must happen—in the words etched in stone on the memorials placed at former Nazi concentration camps, words that resonate throughout the civilized world as a poignant plea to humanity to avoid future genocide—"Never again. Never again. . . . [N]ever . . . again. Never again." The message was not lost on the jury, which returned a verdict that by any measure is outrageous, irrational, and punitive.

This Court and other Michigan courts have repeatedly rejected verdicts prompted by such inherently prejudicial arguments by counsel, even where there is no objection at trial, because such arguments give rise to incurable error. In *Reetz*, for example, this Court held that repeated comments by counsel portraying the defendant as an insensitive powerful corporation required reversal. 416 Mich. at 110-11. *See also Duke v. Am. Olean Tile Co.*, 155 Mich. App. 555, 563, 400 N.W.2d 677 (1986) (rejecting arguments by counsel designed "to inflame the prejudice of the jurors against the defendant, to play upon the helplessness individuals sometimes feel in their dealings with a large corporation").[33] This rule is particularly applicable here, given the deliberate and sustained misconduct by counsel, and especially in light of the then-recent and highly-publicized merger of Daimler-Benz and Chrysler Corporation, a longstanding Michigan-based business.

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[33] *See also Liggett Group, Inc. v. Engle*, — So. 2d — , Nos. 3D00-3400 et al., 2003 WL 21180319, at *13-17 (Fla. Dist. Ct. App. May 21, 2003) (overturning $145 billion punitive damages award where, among other things, counsel engaged in misconduct such as referencing the Holocaust, the civil rights movement, and race generally, which "so fundamentally damages the fairness of a trial, that even in the absence of an objection, a new trial is required in order to maintain the public trust in our system of justice").

As this Court has made clear, there must be "[no] criticism of the nationality of a litigant in a court of justice." *In re: Widening of Woodward Ave.*, 297 Mich. 235, 246, 247 N.W. 468 (1941). *See also Nemet v. Friedland*, 273 Mich. 692, 696-97, 263 N.W.2d 889 (1935) (requiring reversal of verdict where counsel prejudices jury through ethnic references). *See also New York Cent. R.R. Co. v. Johnson*, 279 U.S. 310, 319, 49 S. Ct. 300 (1929) (references to defendant as "eastern railroad" that had "come into this town" and to witnesses "sent on from New York" "have so often been condemned as an appeal to local or sectional prejudice as to require no comment"); *Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534, 540, 541 (2d Cir. 1992) (arguments against "outsiders" are barred "not only by case law, but by that fundamental sense of fairness which guides our system of justice, and by the rules governing the ethical conduct of attorneys"; "No verdict may stand when it is found *in any degree* to have been reached as a result of appeals to regional bias or other prejudice." (emphasis added)). In a recent case with disturbing similarities to the trial below, an appellate court in New York reversed a $20,000,000 jury verdict in a sexual orientation discrimination case because "[p]laintiff's counsel referred to [a defendant], a German national with an apparent accent, as someone who exhibited an 'attitude of hatred' and made forced analogies to Nazi Germany and the Holocaust." *Minichiello v. Supper Club*, 745 N.Y.S.2d 24, 25 (App. Div. 2002). *Cf. Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978) ("A jury which is prejudiced with respect to its finding of liability is not likely to be free from prejudice in awarding damages.").

The Court of Appeals here concluded that "Chrysler's new corporate identity was never an issue at trial" simply because Mr. Fieger "never drew *any explicit connection* between the Nazis and the German corporation" and excused these references on the theory that Mr. Fieger was instead "[referring] to the Holocaust survivors who immigrated to Israel as symbolic of Gilbert's

strength." (83a (emphasis added).) But the fact that Mr. Fieger did not *expressly* equate DaimlerChrysler with Nazi persecutors does not excuse his blatantly improper tactics and does not mitigate the prejudice to DaimlerChrysler in the least.

Moreover, this is precisely the kind of conduct that the Michigan courts have criticized repeatedly. *See, e.g.*, *Badalamenti*, 237 Mich. App. at 289-90 (labeling conduct "truly egregious—far exceeding permissible bounds" and finding that counsel had "completely tainted the proceedings by his misconduct"); *Powell v. St. John Hosp.*, 241 Mich. App. 64, 79-80, 614 N.W.2d 666 (2000) (chastising counsel for, among other things, "twice gratuitously insert[ing] the issue of race into the trial" and engaging in a "deliberate strategy to incite jurors to punish defendant for its bigotry, rather than carefully consider the facts of the case"). The size of the verdict, coupled with Mr. Fieger's appeals to bias, passion, and prejudice, provides overwhelming evidence that the jury based its verdict on improper factors.

C. Ms. Gilbert's Counsel Engaged In Additional Forms Of Misconduct Including Distorting The Evidence, Attacking DaimlerChrysler's Counsel, And Misrepresenting His Close Relationship With An "Expert" Witness

Mr. Fieger's persistent and deliberate efforts to inflame the passions of the jury and to appeal to prejudice included inflammatory and demagogic attacks on DaimlerChrysler and its counsel that were designed to distract the jury from a dispassionate review of the evidence. Moreover, the trial court's suggestion that inflammatory statements alienate a jury and are thus "self-correcting" (22a) is belied by the verdict and directly contrary to this Court's teachings in *Reetz*, 416 Mich. at 111: "[W]hen, as in this case, the theme is constantly repeated so that the error becomes indelibly impressed on the juror's consciousness, the error becomes incurable and requires reversal." *See also Duke*, 155 Mich. App. at 562-65 (trial court's instructions inadequate to cure taint, where among other things plaintiffs' counsel argued that "money talks" and

encouraged jurors to return a large verdict that would cause corporate executives to "sit up and take notice"); *Badalamenti*, 237 Mich. App. at 291-92 & n.6. (same, where among other things plaintiff's counsel referred to defendant's "corporate power" and "sought to divert the jurors' attention from the merits of the case and to inflame the passions of the jury").

In *Badalamenti*, the Court of Appeals found another case involving Mr. Fieger governed by *Reetz*. Much of the misconduct in *Badalamenti* resembles the misconduct in this trial: accusing defense witnesses of fabrication, belittling defense witnesses, arguing that defendants were motivated by money and greed, referring to the defendant's corporate power, and claiming defendants were raising defenses that were "preposterous."

Here, as in both *Reetz* and *Badalamenti*, "[t]he cumulative effect of the improper innuendo, remarks, and arguments by [counsel] was so harmful and so highly prejudicial that [it cannot be] conclude[d] that the verdict in this case was not affected." 237 Mich. App. at 292. Throughout the trial, and most flagrantly in closing argument, Mr. Fieger repeatedly made statements concerning the record that had "no reasonable basis in the evidence presented and were completely improper." *Id.* at 291. Here, as in *Badalamenti*, the trial court did not fulfill its duty to assure that the parties before it received a fair trial. Here, unlike *Badalamenti*, the Court of Appeals inexplicably failed to appreciate, let alone to rectify, the injustice produced by the cumulative effect of Mr. Fieger's misconduct. This Court should remedy that failure by reversing the judgment, granting a new trial on all issues, and making clear that this sort of attorney misconduct will not be tolerated. *Id.* at 292; MCR 2.611(A)(1)(b), (c).

Just as he had in *Badalamenti*, Mr. Fieger repeatedly accused DaimlerChrysler and its witnesses of lying and continually misstated the evidence to exaggerate the conduct at issue. He used declamatory questions, before-the-jury colloquies, and closing argument to convey totally

distorted, hyperbolic, and inflammatory descriptions—"daily and brutal sexual harassment," "never ending repeated incessant activities," "daily torture," "brutal, brutal sexual abuse," and the like. (428a, 487a, 648a, 1209a, 1216a, 1222a, 1226a, 1230a, 1240a-1241a.) In his closing, he claimed that Ms. Gilbert (who reported six instances of offensive conduct to JNAP personnel) had suffered "15,000 incidents" of sexual harassment. (1234a.) He also told the jury that Ms. Gilbert was treated like a "dog" and "kicked and abused everyday" (1248a), and that she had been subjected to "seven years of corporate sponsored torture." (1272a.) *See also Powell*, 241 Mich. App. at 80-81. And having successfully fought to bar DaimlerChrysler from introducing a rebuttal expert, Mr. Fieger twice attacked DaimlerChrysler in closing argument for failing to call an expert. (1248a-1250a, 1254a.) *See Engle*, 2003 WL 21180319, at *13-17.

Mr. Fieger distorted the evidence of DaimlerChrysler's response to Ms. Gilbert's complaints. Although it is unrebutted that investigative efforts began immediately each time she made a complaint, Mr. Fieger repeatedly stated before the jury that DaimlerChrysler *never* did *anything* to respond to or to investigate Ms. Gilbert's complaints. Indeed, this theme became a staple of his questions to DaimlerChrysler's witnesses. (402a-407a, 422a-427a, 459a-460a, 470a-477a, 485a-487a.)[34] He then amplified and further distorted this theme in closing argu-

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[34] For example, Fieger peppered Mr. Pilon, Ms. Gilbert's former supervisor, with questions like: "[Did you ever tell Mr. Holland] this is now a never ending stream of obscene things being directed at Ms. Gilbert?" "Tell me a portion of any [union] agreement that says your hands are tied that prevent[s] you from carrying out your duty under the law [of] the State of Michigan to adequately investigate claims of sexual harassment?" "I want you to assume that other than your claim that you asked some men . . . in March of 1995, can you tell the Court and jury why not one single person from Chrysler Corporation since November 3, 1994 has investigated any of the actions detailed by Linda Gilbert. And I want the question to include [actions that] . . . occurred before the deposition and . . . . Could you tell us why not one human being from Chrysler Corporation other than what you claim you did in March hasn't done a thing?" (485a-487a.) Mr. Fieger also harangued Pilon at length about why he was not told that Gilbert had reported in her November 3, 1994 deposition that someone had "urinated" on her chair. (488a-491a.) Of

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ment. (1216a (DaimlerChrysler knew of harassment and deliberately failed to do anything); 1237a (DaimlerChrysler would not investigate unless Ms. Gilbert could identify who was responsible); 1230a (despite "brutal, brutal sexual abuse" DaimlerChrysler's response was zero); 1243a (DaimlerChrysler would rather attack the victim than remedy the situation); 1246a (DaimlerChrysler did not do anything because it wanted Ms. Gilbert to shut up and go away, and by doing nothing it encouraged abuse); 1265a (nobody associated with DaimlerChrysler ever expressed any concern for Ms. Gilbert).) These are all unmitigated falsehoods.

In yet another recent decision bearing striking resemblances to this case, *Powell*, the Court of Appeals admonished Mr. Fieger for the same kind of misconduct. "We recognize that this case has controversial aspects and that the trial was hotly contested; however, in such situations, the importance of professional courtesy and civility increases exponentially." 241 Mich. App. at 79. The court criticized Mr. Fieger's "deliberate strategy to incite the jurors to punish defendant . . . rather than to carefully consider the facts of the case," the very same conduct that Mr. Fieger engaged in here. *Id.* at 79-80. The court observed that Mr. Fieger "regularly accused witnesses of fabricating their testimony; charges that defense witnesses were 'making up' what they were saying were plentiful." *Id.* at 80. The court warned that "[*s*]*uch conduct does not constitute proper advocacy.*" *Id.* (emphasis added). The court found that Mr. Fieger "indulged in inappropriate hyperbole by repeatedly saying that [plaintiff] 'was tortured,'" *id.* at 80, *just as he did in this case.* (1206a, 1226a, 1259a, 1272a-1273a.) As the court noted, "[w]hile the jury may have recognized that counsel was engaging in hyperbole, the use of the word should be avoided on retrial." *Id.* at 81. Moreover, the court noted that Mr. Fieger's "relentless attacks on defense

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course, Ms. Gilbert's deposition testimony said only that there was "liquid" on the chair and that *she did not know what the liquid was.* (1376a.)

counsel were completely improper. The objections of plaintiff's counsel were accompanied by charges that defense counsel was 'lying' or 'misrepresenting' something or 'making things up.'" *Id.*[35] Mr. Fieger leveled nearly identical, and equally inappropriate, charges at DaimlerChrysler's attorney here. The *Powell* court *"admonish[ed] plaintiff's counsel to refrain from the inappropriate actions . . . in the future."* *Id.* at 79 (emphasis added).

The trial court blandly rejected DaimlerChrysler's attack on Mr. Fieger's mischaracterizations, describing his renditions of the evidence as mere "opinions and subjective judgments." (21a.) But Mr. Fieger went far beyond that, calculatedly doing "just what the courts . . . [have] condemned: he sought to divert the jurors' attention from the merits of the case and to inflame the passions of the jury." *Badalamenti*, 237 Mich. App. at 292.

Moreover, Mr. Fieger went out of his way to paint a grossly misleading picture of his close and long-standing relationship with his "expert" witness, social worker Stephen Hnat. Even though the two had been friends since college and had collaborated on more than a dozen cases yielding multi-million-dollar verdicts, Mr. Fieger falsely informed the jury that their prior contact was minor, incidental, and recent. *See supra* pages 17-18.

In the two decades since this Court last addressed attorney misconduct in *Reetz*, the prevalence of such misconduct has increased dramatically. *See, e.g.*, Allen K. Harris, *The Professionalism Crisis—The "Z" Words And Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. Rev. 549, 556 (2002) (addressing the "marked decline in lawyer pro-

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[35] *See also Engle*, 2003 WL 21180319, at *13-17 (reversing judgment tainted by such misconduct as "juxtapos[ing] defendants' conduct with genocide and slavery"; invoking the civil rights movement; and "malign[ing] a defense attorney by name, calling the attorney's argument to the jury 'a fraud'"); *Owens-Corning Fiberglas Corp. v. Crane*, 683 So. 2d 552, 554-55 (Fla. Dist. Ct. App. 1996) ("it is never acceptable for one attorney to effectively impugn the integrity or credibility of opposing counsel before the jury").

fessionalism"); James A. George, *The "Rambo" Problem: Is Mandatory CLE The Way Back To Atticus?*, 62 La. L. Rev. 467, 469 (2002) ("[W]e are deluding ourselves if we do not admit something is wrong with our profession . . . ."). Two published decisions of the Court of Appeals in the last four years have found that the kinds of tactics that produced the verdict here, *by the very same lawyer*, are improper, but the lower courts here rewarded such tactics with a record-setting verdict without even expressing a hint of concern or criticism.

This Court should announce that such blatant misconduct as was perpetrated below has no legitimate place in a Michigan court of law and that verdicts rendered in cases involving such misconduct are void. When a trial court observes misconduct of this sort, whether or not an attorney objects, the court should sua sponte admonish counsel engaging in the misconduct, inform the jury that such comments are improper, and instruct the jury to disregard counsel's statements. Where misconduct occurs more than once in the same case, trial courts should give serious consideration to declaring a mistrial and ordering appropriate sanctions against counsel. The scurrilous conduct below mandates reversal and a remand for a new trial on all issues, plus any other relief this Court deems just and appropriate.

III. The Erroneous Admission Of "Expert" Medical Testimony From A Social Worker, Coupled With The Exclusion Of Proper Rebuttal Testimony, Prejudiced DaimlerChrysler And Requires A New Trial

Ms. Gilbert's entire causation and damages case rests on the novel proposition that sexual harassment in the workplace caused her to become a chronic alcoholic with severe physical and mental disorders who will die a premature and agonizing death from a pancreas disorder. On its face, that apparently unprecedented "death by harassment" theory is highly dubious. One would expect that to prove such a new and uncharted theory, Ms. Gilbert (who is still very much alive and working for DaimlerChrysler) would have presented testimony from medical doctors and psychologists to confirm her claim. But she offered no such evidence. Instead, she relied pri-

marily on the testimony of Stephen Hnat, a social worker untrained in medicine or psychiatry, to offer medical opinions that he was obviously incompetent to give. Ms. Gilbert also presented testimony from another social worker, Carol Katz, who purported to diagnose her and to opine on sexual harassment generally, despite being no more qualified than Mr. Hnat. In response to this startling and unexpected medical testimony, DaimlerChrysler proffered a rebuttal expert, Dr. Rosalind Griffin, a medical doctor who specializes in psychiatry, but the trial court excluded her testimony because she was not listed in the final pre-trial order. The net result of the trial court's rulings concerning these witnesses was that the jury heard days and days of dramatic, emotional, and inflammatory "expert" testimony that was, at its core, entirely incompetent, but that went largely unrebutted. If this Court does not hold that DaimlerChrysler is entitled to judgment notwithstanding the verdict, then a new trial must be ordered on all issues.[36]

A. Trial Courts Must Fulfill Their Gatekeeping Role By Ensuring Proper Qualification Of An Expert Witness In The Relevant Subject Matter Before Allowing The Witness To Testify

In order for expert testimony to be proper under MRE 702, the proponent must establish a foundation based on education or other specialized knowledge. *See, e.g., Nelson v. Am. Sterilizer Co.*, 223 Mich. App. 485, 491, 566 N.W.2d 671 (1997); *see also* MCL § 600.2955. *Cf. Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-90, 113 S. Ct. 2786 (1993) (addressing gatekeeper role of federal courts with regard to expert testimony). To require less would subvert the essential purpose of expert testimony to assist the jury and would deny litigants any semblance of a fair adjudication. Indeed, Michigan's rules concerning admission of expert testimony are "more rigorous" than federal law. *People v. McMillan*, 213 Mich. App. 134, 137 n.2, 539

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[36] A trial court's decision to deny a motion for new trial is generally reviewed for abuse of discretion. *Bosak v. Hutchinson*, 422 Mich. 712, 737, 375 N.W.2d 333 (1985).

N.W.2d 553 (1995); *People v. Lee*, 212 Mich. App. 228, 262 n.17, 537 N.W.2d 233 (1995). Where medical evidence is at issue, "[t]he party proffering the evidence bears the burden of demonstrating its acceptance in the medical community." *SPECT Imaging, Inc. v. Allstate Ins. Co.*, 246 Mich. App. 568, 578, 633 N.W.2d 461 (2001). *See also Nelson*, 223 Mich. App. at 498. "The reliability of the expert's testimony is to be determined by the *judge* in advance of its admission—not by the jury at the conclusion of the trial by evaluating the testimony of competing expert witnesses." *Tobin v. Providence Hosp.*, 244 Mich. App. 626, 651, 624 N.W.2d 548 (2001). Where the proponent of the expert testimony "does not establish the evidentiary reliability and trustworthiness of his scientific conclusions or demonstrate that they constitute 'recognized scientific knowledge,'" admitting that testimony is error. *Id.*

The danger that a jury will be unduly swayed by expert testimony is especially acute in technical and scientific areas, fields that require substantial advanced education and professional certification before one can be considered qualified to practice or to opine. "'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force . . . exercises more control over experts than over lay witnesses.'" *Daubert*, 509 U.S. at 595 (quotation omitted). There was no showing here that Mr. Hnat was qualified to render the opinions he rendered or that those opinions were based upon scientifically reliable methodology. As Michigan courts have observed, "'[j]unk science' has no place in our courtroom.'" *People v. Hubbard*, 209 Mich. App. 234, 242 n.2, 530 N.W.2d 130 (1995).[37]

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[37] The trial court's gatekeeping obligation carries no less weight where the expert relies not on the application of scientific principles, but "on skill- or experience-based observation." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151, 119 S. Ct. 1167 (1999).

"The subject matter of the expert's testimony should be directly related to and within the immediate scope of the witness' expertise." *Franzel v. Kerr Mfg. Co.*, 234 Mich. App. 600, 621, 600 N.W.2d 66 (1999). Even where a witness qualifies as an expert, testimony must be confined to the subject upon which the witness is competent to opine. *See, e.g.*, *Stull v. Fuqua Indus., Inc.*, 906 F.2d 1271, 1275 (8th Cir. 1990) (affirming preclusion of mechanical engineer from testifying about anatomy); *Magdaleno v. Burlington N. R.R. Co.*, 5 F. Supp. 2d 899, 906 (D. Colo. 1998) ("Dr. Konz, of course, is an expert of ergonomics and is not a physician. He is, therefore, not qualified as an expert to opine as to Magdaleno's medical condition . . . ."); *United States v. Berrios-Rodriguez*, 768 F. Supp. 939 (D.P.R. 1991) (precluding clinical psychologist, who was not a medical doctor, from testifying about effects of drug use upon memory); *Combs v. Norfolk & W. Ry. Co.*, 507 S.E.2d 355, 358-59 (1998) ("Schneck was qualified at trial as an expert in the field of biomechanical engineering and he was competent to render an opinion on the compression forces placed on Combs' spine at the time of the incident. However, Schneck was not a medical doctor and, thus, was not qualified to state an expert medical opinion regarding what factors cause a human disc to rupture and whether Combs' twisting movement to catch the toilet could have ruptured his disc."). Moreover, expert testimony must be based on the evidence in the record. *See Badalamenti*, 237 Mich. App. at 286 (expert opinion testimony is improper "where it is based on assumptions that are not in accord with the established facts").

Only where a proffered expert is demonstrated to meet the rigorous standard for expert testimony under Michigan law can the witness present opinion testimony to the jury. Erroneous admission of an expert's testimony will in all but the most unusual cases constitute prejudicial, reversible error, as it plainly did here.

B. Social Workers Untrained And Unlicensed In Medicine Or Psychiatry Are Not Competent To Render Expert Opinions About Such Medical Matters As Diagnosing Physical And Mental Ailments, Determining The Causes Of Ailments, And Evaluating Prognoses

Under Michigan law, social workers untrained and unlicensed in medicine or psychiatry are plainly not competent to render expert opinions regarding such medical matters as diagnosing patients' physical or mental diseases or conditions, identifying the causes of those diseases or conditions, or assessing the likely outcomes that patients will experience. *See, e.g.*, *People v. Walker*, 84 Mich. App. 700, 270 N.W.2d 498 (1978) (error to allow social worker to give expert opinion on mental competency); *People v. Skowronski*, 61 Mich. App. 71, 79, 232 N.W.2d 306 (1975) (error to allow social worker to give expert testimony evaluating psychological tests). *Cf. McCann v. Schanz*, 461 Mich. 15, 597 N.W.2d 148 (1999) (upholding statute restricting expert testimony of physicians in medical malpractice cases to their own specialties); *McDougall v. Comm'r of Soc. Sec.*, No. 99-CV-72298, 2000 WL 246605, at *3 (E.D. Mich. Feb. 2, 2000) (noting that a social worker is not an acceptable "medical" source under federal regulations governing disability determinations).[38]

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[38] *Grow v. W.A. Thomas Co.*, 236 Mich. App. 696, 601 N.W.2d 426 (1999), is not necessarily to the contrary. In *Grow*, the court affirmed in three paragraphs the trial court's ruling allowing a social worker to "render his opinion regarding plaintiff's *symptoms* of posttraumatic stress disorder." *Id.* at 435 (emphasis added). No further detail is provided regarding the substance of that testimony, and there is no indication that the witness testified about anything other than symptoms he observed while treating the plaintiff. Nor does the opinion suggest that the witness actually *diagnosed* the plaintiff as having post-traumatic stress disorder, or any other affliction, or that the witness purported to identify either the cause or the consequence of any ailment. To the extent, however, that *Grow* can be read as supporting the qualification of social workers as experts on the causes, diagnosis, and effects of post-traumatic stress disorder or any other physical or mental condition, that decision is inconsistent with the great weight of precedent set forth above, as well as Michigan law regarding expert witnesses more generally, and should be overruled.

Other courts throughout the Nation have reached similar conclusions. *See, e.g.*, *Vallinoto v. DiSandro*, 688 A.2d 830, 839-40 (R.I. 1997) (reversing admission of expert testimony from social worker who testified that "alleged psychic and physical ills were proximately caused" by defendant's actions because "[t]he origin and the causal connection of those psychic and physical complaints . . . required expert medical opinion"; "we require . . . along with the vast majority of judicial authority, that psychic as well as physical injury claims must be supported by competent expert medical opinion regarding origin, existence, and causation"); *State v. Willis*, 888 P.2d 839, 845 (Kan. 1995) (holding that social worker is not qualified to "diagnose medical and psychiatric conditions such as post-traumatic stress disorder").[39]

Indeed, even witnesses with *more* training and expertise than that of a social worker, including licensed psychologists, have been held unqualified to render quintessentially *medical* testimony such as was admitted here. *See, e.g.*, *Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599 (10th Cir. 1997) (holding that psychologist is not an expert in fields of medicine or toxicology and thus not qualified to testify regarding causal link between dementia and brain damage due to toxic exposure); *John v. Im*, 559 S.E.2d 694, 697 (Va. 2002) (affirming exclusion of expert testimony that plaintiff sustained brain injury from automobile accident: "An opinion concerning

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[39] *See also Edmonds v. Illinois Cent. Gulf R.R. Co.*, 910 F.2d 1284, 1286-87 (5th Cir. 1990) (reversing admission of expert testimony by clinical psychologist to show that "stress [can] trigger other problems with the human body" and that there was a causal relationship between the plaintiff's on-the-job head injury and a subsequent heart attack, because the witness "is not a medical doctor, and he is not involved in making medical diagnoses or ordering medical studies or tests. The question whether stress worsened the plaintiff's coronary artery disease is a medical issue that is plainly beyond the witness's expertise in the field of psychology."); *United States v. Crosby*, 713 F.2d 1066, 1077 (5th Cir. 1983) (witness with master's degree in social work properly excluded as expert in diagnosis of post-traumatic stress disorder because "only physicians could qualify as diagnostic experts concerning this medical condition"); *State v. Goodwin*, 357 S.E.2d 639 (N.C. 1987) (ordering new trial based on improper admission of licensed social worker as expert because expertise in social work does not qualify individual to give opinion on post-traumatic stress disorder).

the causation of a particular physical human injury is a component of a diagnosis, which is part of the practice of medicine."; "[The expert] was a licensed psychologist, not a medical doctor. Therefore, since [he] was not a medical doctor, he was not qualified to state an expert medical opinion regarding the cause of [plaintiff's] injury.").[40]

C. The Trial Court's Evidentiary Rulings Regarding Expert Testimony Severely Prejudiced DaimlerChrysler

The trial court's rulings allowed two social workers to testify on behalf of Ms. Gilbert, each purporting to diagnose and to attribute to DaimlerChrysler mental ailments, including post-traumatic stress disorder, and with one witness going much further, purporting to diagnose numerous *physical* ailments supposedly resulting from sexual harassment. DaimlerChrysler objected to this testimony, but to no avail. And when DaimlerChrysler proffered a medical doctor to rebut this unanticipated ambush, the trial court excluded the company's witness, on the ground that DaimlerChrysler had not disclosed the witness *before* the surprise testimony was given. The prejudice to DaimlerChrysler is obvious and substantial, and it requires reversal of the judgment.

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[40] *See also Martin v. Benson*, 481 S.E.2d 292, 296 (N.C. Ct. App. 1997) ("[I]t is evident that the practice of psychology does not include the diagnosis of medical causation."), *rev'd on other grounds*, 500 S.E.2d 664 (N.C. 1998); *Antoine-Tubbs v. Local 513, Air Transport Div., Transport Workers Union of Am.*, 50 F. Supp. 2d 601, 609 (N.D. Tex. 1998) (barring osteopathic doctor from testifying that emotional distress led to miscarriage, where proffered testimony on causation was not "soundly grounded in traditional clinical medical knowledge" and thus was speculative), *aff'd*, 190 F.3d 537 (5th Cir. 1999). *See generally* James J. McDonald, Jr. and Paul R. Lees-Haley, *Avoiding "Junk Science" In Sexual Harassment Litigation*, 21 Empl. Rel. L.J. No. 2, 51, 59-64 (Autumn 1995) (noting that for purposes of testifying regarding psychological—not physical—disorders, "[f]or experts who are not licensed clinical psychologists or Board-certified psychiatrists, [the *Daubert*] threshold will be difficult to meet" (footnote omitted), and demonstrating that litigants often offer loose and improper "expert" testimony regarding such disorders as post-traumatic stress disorder and major depression even though under the "strict diagnostic criteria" of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* such conditions *cannot* be diagnosed based on "nonassaultive sexual harassment").

1. Improper Admission Of Stephen Hnat's Testimony

Stephen Hnat—a social worker untrained and unlicensed in medicine or psychiatry—was allowed despite DaimlerChrysler's objection to give a detailed medical diagnosis of and prognosis for Ms. Gilbert's condition.[41] Mr. Hnat, "who testified for four days as an expert" (66a), misrepresented his credentials to the jury, falsely claiming to have a master's degree in "psychobiology" and to have won a prestigious prize, and participated with Mr. Fieger in shielding the jury from the truth about his longstanding and very close relationship with Mr. Fieger. He was then permitted to give expert testimony to a "reasonable degree of psychological certainty" that sexual harassment caused Ms. Gilbert to relapse into alcoholism, fundamentally changed her brain chemistry, fatigued her brain, led to a new fatal depression disorder, and would ultimately result in her premature death from a host of ailments including pancreatitis, which he described as "the most painful way to die." (610a-613a, 678a-683a.)[42]

In short, Mr. Hnat qualified as one kind of expert but was permitted to testify in a very different field of expertise. Although he might be competent to discuss twelve-step programs and how to counsel individuals to stop using drugs or alcohol, there was no evidence from which the lower courts or the jury could find Mr. Hnat qualified to diagnose brain disorders and mental

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[41] The objection (603a-605a) plainly invoked MRE 702's requirement that an expert witness be qualified to render his proposed testimony on medical or scientific subjects. In general, a trial court's decision to admit evidence is reviewed for abuse of discretion. *Chmielewski v. Xermac, Inc.*, 457 Mich. 593, 614, 580 N.W.2d 817 (1998). However, as the cases cited above indicate, special sensitivity attends rulings regarding the admission of expert testimony.

[42] Mr. Hnat's opinion testimony did not, of course, even correspond with the facts as described by Ms. Gilbert, on whose behalf he was testifying. Contrary to Mr. Hnat's testimony, Ms. Gilbert stated that she had periods of drinking in 1992, had been arrested twice for drunk driving in the summer of 1992, and had never been diagnosed with any fatal disorder.

diseases and to opine as to their causes, or to review and to interpret the medical records of treating physicians, or to opine regarding the prospects for an individual's recovery—or death.

The admission of this testimony was unquestionably prejudicial here, because both the trial court and the Court of Appeals expressly relied on Mr. Hnat's testimony in concluding that this case was different from other sexual harassment cases such that an enormous upward departure from prior awards was justified. (53a-54a, 94a.) Without that testimony, there would have been no support for Ms. Gilbert's theory that the alleged sexual harassment caused her alcoholism or that the result would be her premature and agonizing death. Mr. Hnat's testimony was the linchpin for Ms. Gilbert's entire theory of causation and damages.

Defendants should not have to rely on impeachment to guard against slick and smooth-talking, but completely unqualified, individuals who seek to present improper "expert" testimony. In the view of the courts below, there is virtually no limit on expert testimony, and any error in its admission is cured by the defendant's right of cross-examination. Such a rule is not fair, it is not reasonable, and it fundamentally misapprehends the appropriate role of expert testimony in Michigan courts in a manner that will do great harm to the civil justice system.

2. Improper Admission Of Carol Katz's Testimony

The trial court also erred in allowing the testimony of Carol Katz, another social worker whom Ms. Gilbert had not named in the final pretrial order and who was brought forward with only a few days notice. After a lengthy argument on DaimlerChrysler's objection that Ms. Katz did not even fall within the generic category for "physicians and psychologists" and that Ms. Gilbert had not provided the relevant medical records until the beginning of trial (686a-700a), the trial court ruled that Ms. Katz could testify as a "fact" witness, but could not offer expert opinions. (701a-702a.) Nonetheless, the court permitted Ms. Katz to opine that sexual harassment caused Ms. Gilbert to suffer from "major depression-recurrent" and "post-traumatic

stress disorder." (742a-743a.) She also was allowed to opine, in psychodynamic terms, without any explanation of her methodology or its reliability, that Ms. Gilbert's experiences with sexual harassment caused her relapses and suicide attempts and that her prognosis "probably . . . would have been good" without the harassment at work, but instead was "fair to poor." (744a-756a, 764a-769a.) Ms. Katz also offered entirely subjective and unscientific opinions that both sexual harassment and alcohol use were common in factories (though she had rarely been in factories), and thus that any harassment or ostracism directed against Ms. Gilbert must have been because she was a woman, not because she was drinking on or before the job. (759a-763a, 770a-774a, 780a-785a.) Allowing Ms. Katz to testify despite being unlisted and to offer an array of unsupported opinions was an abuse of discretion and extremely prejudicial error.

3. Improper Exclusion Of Dr. Rosalind Griffin's Testimony

The trial court compounded its errors in permitting Mr. Hnat and Ms. Katz to give "expert" medical testimony and opinions by denying DaimlerChrysler an opportunity to present the rebuttal testimony of Dr. Rosalind Griffin, a physician specializing in psychiatry and the only witness qualified to address these issues proffered at trial. (1079a-1091a, 1191a-1192a.) It is well settled that "[e]ither party is entitled to introduce evidence to rebut that of his adversary, and any competent evidence counteracting or disproving the other party's proof is proper rebuttal." *Arnold v. Ellis*, 5 Mich. App. 101, 114, 145 N.W.2d 822 (1966) (quotation omitted); *see also Elmore v. Ellis*, 115 Mich. App. 609, 613-14, 321 N.W.2d 744 (1982). Erroneous exclusion of proper expert rebuttal testimony requires reversal. *See Murphy v. Magnolia Elec. Power Ass'n*, 639 F.2d 232, 235 (5th Cir. 1981) ("[i]n view of the absence of prejudice and the essential nature of the evidence involved, the trial judge abused his discretion in prohibiting the rebuttal testimony"); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1201-02 (3d Cir. 1978) (error to exclude critical expert testimony when no prejudice to opposing party is evident).

The trial court refused to allow Dr. Griffin to testify because she was not listed in the final pretrial order. The Court of Appeals acknowledged that this question was "close" (93a), but deferred to the trial court, which had concluded that DaimlerChrysler should have expected Ms. Gilbert to link her alcoholic relapses to the harassment. But no one, including Ms. Gilbert, could have anticipated that Mr. Hnat, opining from Ms. Gilbert's medical records prepared not by him but by *other* individuals, would tell the jury that they read like her death certificate. Nor could DaimlerChrysler anticipate that the trial court would allow Mr. Hnat, who last saw Ms. Gilbert in early 1994, to "channel" the purported opinions of physicians who had seen her since. Dr. Griffin was to be called specifically to rebut this unforeseeable opinion testimony by Mr. Hnat. And the trial court's refusal to allow DaimlerChrysler to call Dr. Griffin cannot be reconciled with its allowing Ms. Gilbert to call the unlisted Ms. Katz, who opined without objective foundation that sexual harassment was prevalent in automobile plants. The trial court plainly had discretion to permit Dr. Griffin, although an unlisted witness, to testify to prevent the "manifest injustice" that resulted from Mr. Hnat's and Ms. Katz's surprising and highly damaging testimony. *Hanlon v. Firestone Tire & Rubber Co.*, 391 Mich. 558, 564, 218 N.W.2d 5 (1974); *Jamison v. Lloyd*, 51 Mich. App. 570, 574-75, 215 N.W.2d 763 (1974); *Butt v. Giammariner*, 173 Mich. App. 319, 433 N.W.2d 360 (1988). The trial court abused its discretion and seriously prejudiced DaimlerChrysler when it excluded Dr. Griffin's critical rebuttal testimony.

This case presents an opportunity for this Court to emphasize the special attention that trial courts must devote to determining whether to admit expert testimony, what topics are appropriate for a given witness, and when fairness requires allowing an unlisted rebuttal witness to testify. Only a new trial on all issues can undo the prejudice caused by these evidentiary errors.

IV. The Excessive Damages Award Violates Michigan Law And The Due Process Clause Of The Fourteenth Amendment To The United States Constitution

The $21,000,000 award, which with interest is now approaching $40,000,000, is more than 70 times larger than the largest sexual harassment verdict previously upheld on appeal in Michigan in a published opinion. The award is also 70 times larger than the $300,000 maximum allowable recovery for sexual harassment under Title VII of the Civil Rights Act of 1964, a figure that covers compensatory and punitive damages combined. Indeed, the verdict is the largest single-plaintiff sexual harassment award upheld on appeal anywhere in the entire country. The conduct here, however, far from being orders of magnitude worse than any sexual harassment previously experienced by anyone, anywhere, was at most "somewhat lower on the continuum" according to the Court of Appeals. Michigan law and federal due process principles require that courts engage in meaningful review of damages awards to guard against excessive verdicts that arbitrarily deprive defendants of property. As shown below, the judgment here was excessive and must be reversed.[43]

A. Michigan Law Requires That Courts Engage In Meaningful Judicial Review Of Damages Awards, Including Comparisons To Judgments In Factually Comparable Cases, To Guard Against Excessiveness

For centuries, courts have reviewed damage awards to ensure that they are not arbitrary, biased, excessive, or unfair. "Common-law courts in the United States followed their English predecessors in providing judicial review of the size of damages awards. They . . . recognized

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[43] Denial of a new trial is ordinarily reviewed for abuse of discretion. *Bosak*, 422 Mich. at 731. Remittitur is justified if the verdict is excessive. *Palenkas v. Beaumont Hosp.*, 432 Mich. 527, 531, 443 N.W.2d 354 (1989); MCR 2.611(E)(1). A denial of remittitur is reviewed for abuse of discretion. *Leavitt v. Monaco Coach Corp.*, 241 Mich. App. 288, 305, 616 N.W.2d 175 (2000). This case also implicates federal due process safeguards under which awards of punitive damages are subject to *de novo* review. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678 (2001). The legal issue concerning governing excessiveness standards is subject to *de novo* review.

that juries sometimes awarded damages so high as to require correction." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 424, 114 S. Ct. 2331 (1994); *id.* at 436 (Scalia, J., concurring) ("The Court's opinion establishes that the right of review . . . was a procedure traditionally accorded at common law. The deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing state-prescribed limits upon such deprivation violates the Due Process Clause."). "[I]f it should clearly appear that the jury . . . have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433, 116 S. Ct. 2211 (1996) (citation omitted; noting historic bases for judicial scrutiny of damages awards).

Michigan law has long recognized the importance of protecting litigants from excessive verdicts. In *Palenkas v. Beaumont Hospital*, 432 Mich. 527, 443 N.W.2d 354 (1989), this Court rejected the subjective and standardless "shock the conscience" approach to reviewing awards of noneconomic damages for excessiveness and held that courts should look for "objective" standards that are "potentially verifiable in the written record." *Id.* at 532-33. This Court expressly approved of considering "whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions." *Id.* at 532. After addressing the various comparable awards presented as evidence, this Court "recognize[d] that none of the fifteen [comparable] cases . . . presents the identical facts and evidence as that heard by the jury in the instant case." *Id.* at 537-38. "Nonetheless, a comparison of jury awards in analogous . . . cases

is warranted here. While such a comparison cannot serve as an exact indicator, it does provide an objective means of determining the range of appropriate awards in such cases." *Id.* at 538.[44]

The decisions below would not and could not draw meaningful distinctions between an award of a thousand dollars, or a million dollars, or a billion dollars. Objective criteria are essential to fair judicial review. If each case were reviewed solely on its own terms, without reference to awards in comparable cases, then the only protection litigants would have from arbitrary and capricious confiscation of their property is the personal sensibilities of individual judges. Fundamental fairness and the rule of law require objective standards for evaluating the size of these highly subjective noneconomic damages awards.

Judgments in comparable cases provide an essential objective benchmark in evaluating excessiveness. Where, as here, an award is off the charts compared to comparable cases, it is plainly excessive.

B. The Due Process Clause Of The Fourteenth Amendment To The United States Constitution Requires That Courts Engage In Meaningful Judicial Review Of Damages Awards For Excessiveness

As noted above, the verdict contains an undeniably punitive element, based on not only the punitive damages rhetoric used by Ms. Gilbert's counsel, but also the fact that the enormous $21,000,000 award is so disconnected from any actual injury and so unrelated to any prior com-

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[44] This Court's approach in *Palenkas* is consistent with prior Michigan decisions. *See, e.g., Precopio v. Detroit Dep't of Transp.*, 415 Mich. 457, 470-81, 330 N.W.2d 802 (1982) ("a plaintiff must establish injury and the appropriate compensation therefor with reasonable certainty"; reviewing nearly *40* awards in comparable cases throughout the country to evaluate excessiveness); *Fishleigh v. Detroit United Ry.*, 205 Mich. 145, 167-68, 171 N.W. 549 (1919) (looking to comparable awards to evaluate excessiveness); *Haverbush v. Powelson*, 217 Mich. App. 228, 241, 551 N.W.2d 206 (1996) ("courts frequently look to comparable awards in similar cases to evaluate whether a particular award exceeds the range demonstrated by the evidence"); *May v. William Beaumont Hosp.*, 180 Mich. App. 728, 754, 448 N.W.2d 497 (1989) ("since no trier of fact can value pain and suffering with mathematical certainty, it is appropriate for a reviewing court to look to analogous cases for guidance").

parable award as to demonstrate that passion, prejudice, and a desire by the jury to punish DaimlerChrysler produced this result.[45] Such a disguised punitive damage award raises serious federal questions under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In a series of recent decisions, the United States Supreme Court has held that grossly excessive punitive damage awards violate due process, and thus courts must review such awards *de novo* on appeal pursuant to three objective "guideposts" to ensure that they do not exceed constitutional limits. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003) (reaffirming "the importance of these three guideposts" for evaluating excessiveness of punitive damages awards); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996) (establishing federal due process principles governing judicial review of punitive damages awards for excessiveness); *Cooper Indus.*, 532 U.S. at 441 (holding that appellate courts must scrutinize punitive damages *de novo* pursuant to the *BMW* criteria). "'Exacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm*, 123 S. Ct. at 1520-21 (citation omitted).

Those constitutional standards, which include comparing the award to comparable statutory penalties, *BMW*, 517 U.S. at 583-84, which here would include federal limits on harassment awards, would plainly require that this verdict be set aside. But instead, simply because the damages were labeled "compensatory" on the verdict form, the courts below denied DaimlerChrysler any semblance of meaningful judicial scrutiny of what amounts to an extreme and arbitrary penalty. The United States Supreme Court, however, has squarely held that the label at-

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[45] The irrationality of the award is further confirmed by the fact that the jury purported to award $1,000,000 "in trust" for, among other things, "the loss of future earning capacity" (7a), even though there was no evidence whatsoever on that issue, and Ms. Gilbert works for DaimlerChrysler to this day.

tached to a penalty does not insulate it from scrutiny. *See, e.g.*, *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S. Ct. 518 (1966) (striking down a state statute authorizing juries to impose costs of misdemeanor prosecutions on acquitted defendants, holding that statute "whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague").

Indeed, just as in Michigan, federal courts look to comparable cases to evaluate whether an award of noneconomic damages is excessive so as to prevent arbitrary deprivations of property. *See, e.g.*, *Lilley v. BTM Corp.*, 958 F.2d 746, 754 (6th Cir. 1992) ("Our determination is to be guided by awards upheld in similar cases"); *Joan W. v. City of Chicago*, 771 F.2d 1020, 1025 (7th Cir. 1985) (finding the award "flagrantly extravagant and out of line with the other [comparable] cases"); *Levka v. City of Chicago*, 748 F.2d 421, 425 (7th Cir. 1984) ("One factor *we must consider* in determining whether to set aside an award is whether the award is out of line compared to other awards in similar cases" (emphasis added)); *Mathie v. Fries*, 121 F.3d 808, 813-14 (2d Cir. 1997) ("[T]he determination of whether a damages award exceeds a reasonable range 'should not be made in a vacuum,' but should include consideration of the amounts awarded in other, comparable cases." (citation omitted)).[46]

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[46] *See also Martell v. Boardwalk Enters., Inc.*, 748 F.2d 740, 750-55 (2d Cir. 1984) (finding award "outrageously extravagant" in comparison to similar cases); *Dagnello v. Long Island R.R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961) ("Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, *but whether the amount is so high that it would be a denial of justice to permit it to stand*. . . . [S]urely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." (footnote omitted)); *Hetzel v. County of Prince William*, 89 F.3d 169, 172-73 (4th Cir. 1996) (reviewing comparable awards for intangible injuries and finding emotional distress verdict "outrageous"); *Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989) ("[W]hile comparisons with other cases are not dispositive, . . . [o]ur review of the record, informed by a review of awards granted in other comparable cases, indicates that the award [was excessive]"); *Hagge v. Bauer*, 827 F.2d 101, 109 (7th Cir. 1987) ("Lest we grope for objective standards of compensatory damages in thin air, comparabil-

[Footnote continued on next page]

C. The Judgment Is Excessive Under Michigan And Federal Law

The $21,000,000 verdict is off the charts compared to sexual harassment verdicts (and other cases), and the lower courts erred when they refused to grant a new trial or at least a significant remittitur on the basis of excessiveness. As noted above, the award here is more than 70 times larger than the largest sexual harassment award previously upheld on appeal in Michigan in a published ruling, which was $272,000. *See Eide v. Kelsey-Hayes Co.*, 154 Mich. App. 142 (1986), *aff'd in part and rev'd in part on other grounds*, 431 Mich. 26 (1988). That case involved conduct far more egregious than was present here, including unwelcome touching and requests for sex from supervisors, an attempt to handcuff the plaintiff to her work station, and having a drawing of a nude woman bearing a vulgar nickname given her in the plant taped to her back without her knowledge. *Id.* at 147-48. The verdict is also 70 times larger than the $300,000 maximum allowable recovery for sexual harassment under federal law, a maximum that covers compensatory and punitive damages combined. *See* 42 U.S.C. § 1981a(b)(3)(D). And it dwarfs noneconomic damage awards upheld in other cases involving far more serious injuries.[47]

[Footnote continued from previous page]
ity has developed as an element of damage award analysis"); *Nyman v. F.D.I.C.*, 967 F. Supp. 1562, 1572 (D.D.C. 1997) (finding compensatory award in Title VII action excessive in light of similar cases involving non-economic intangible damages).

[47] *See, e.g., Phillips v. Mazda Motor Mfg. (USA) Corp.*, 204 Mich. App. 401, 516 N.W.2d 502 (1994) ($3,300,000 verdict affirmed in wrongful death action where 22-year old man was crushed by falling steel truss and remained conscious for about thirty minutes); *Byrne v. Schneider's Iron & Metal, Inc.*, 190 Mich. App. 176, 475 N.W.2d 854 (1991) (eight-year old boy suffocated in sand pit; jury valued his pain and suffering at $100,000, and his parents and two sisters each received $500,000); *Bordeaux v. Celotex Corp.*, 203 Mich. App. 158, 511 N.W.2d 899 (1993) (one living and two dead asbestos plaintiffs; before reductions for comparative negligence, verdict for living plaintiff was $1,500,000 for malignant tumors in neck, and verdicts for deceased individuals were $1,000,000 and $600,000).

Here, by contrast, there was no allegation that any employee ever touched Ms. Gilbert or propositioned her for sex, or that DaimlerChrysler retaliated against her in any way. Although her counsel and expert witness contended at trial that the harassment she allegedly experienced at DaimlerChrysler was so severe that it will cause her premature death, it was apparently not even so serious as to amount to a constructive termination, as Ms. Gilbert continues to work for DaimlerChrysler to this day. She testified that no medical doctor had ever diagnosed her as having any sort of fatal illness. Nevertheless, Mr. Fieger asked the jury to award $140,000,000, and it awarded $21,000,000. Then, Mr. Fieger's preposterous argument for an award of $140,000,000 somehow became a basis to *sustain* the award in the eyes of the lower courts, because the jury awarded only 15% of that absurdly excessive amount.

In addition to the $272,000 award in *Eide*, which as noted above is the largest single-plaintiff sexual harassment verdict previously upheld on appeal in a published decision in Michigan, and for conduct far more severe than was at issue here, several other comparable cases DaimlerChrysler presented to the lower courts help to establish the customary verdict range for cases such as this. In *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997), for example, the plaintiff endured repeated comments by supervisors concerning her breasts, lip-smacking and kissing noises, being kicked by her manager, and assorted verbal mistreatment by her manager including daily insults to her intelligence and being called obscene names. The jury returned a verdict under the Missouri Human Rights Act of $35,000 in compensatory damages, $1 in back pay, and $50,000,000 in punitive damages. The trial court reduced the punitive damages award to $5,000,000, and the Eighth Circuit further trimmed that award to $350,000.

Other cases are in accord:

- In *Howard v. Canteen Corp.*, 192 Mich. App. 427, 481 N.W.2d 718 (1991), *overruled on other grounds by Rafferty v. Markovitz*, 461 Mich. 265, 602 N.W.2d 367 (1999), the plaintiff was awarded $200,000 for emotional distress over "a lengthy period" during which a supervisor frequently subjected her to sexual conversations and made inquiries about her personal life, and even went through her purse.
- In *Grow v. W.A. Thomas Co.*, 236 Mich. App. 696, 601 N.W.2d 426 (1999), the jury awarded emotional distress damages of $80,555 where from the outset of the plaintiff's employment her supervisor subjected her to "continuous sexual harassment" that "included sexually explicit comments and unwanted kissing and groping," and the plaintiff's emotional distress was evidenced by a suicide attempt and various physical ailments.
- In *Bihun v. AT&T Information Systems, Inc.*, 16 Cal. Rptr. 2d 787 (Ct. App.), *overruled on other grounds*, *Lakin v. Watkins Associated Industries*, 863 P.2d 179 (Cal. 1993), the court affirmed an award of $662,000 for emotional distress where the plaintiff was harassed over a nine-month period by a vice president who made numerous sexual advances and direct requests that the plaintiff have an affair with him, pressed his body against hers several times, and placed his hand on her breast. When the plaintiff rejected his advances, he retaliated by taking away the plaintiff's job responsibilities.
- In *Spina v. Forest Preserve District of Cook County*, 207 F. Supp. 2d 764 (N.D. Ill. 2002), the plaintiff was the first female forest preserve officer assigned to her work area, and fellow officers belittled and ostracized her for four years to the point where she feared that they would not back her up in dangerous situations. The jury awarded

$3,000,000 for emotional distress under 42 U.S.C. § 1983, which is not subject to Title VII's cap on damages, and the court reduced the jury's award to $300,000.

- In *Horney v. Westfield Gage Co.*, 211 F. Supp. 2d 291 (D. Mass. 2002), the plaintiff worked for four years in a machine shop rife with sexually explicit material and obscene and abusive language directed at women. Pornographic material was often left on the plaintiff's desk, sexual jokes were posted publicly, and her supervisor was hostile to her. The jury awarded $250,000 for emotional distress damages.

Using prior awards as an objective benchmark, the $21,000,000 award here is grossly excessive and should have been set aside or drastically reduced. The award also is excessive when evaluated pursuant to the other criteria identified in *Palenkas* for determining excessiveness, including whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact, and whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained. 432 Mich. at 532-33. For example, the excessive damages award was plainly influenced by, and upheld based on, Mr. Fieger's argument that Ms. Gilbert should receive in this action damages for the alleged shortening of her life—a theory of "anticipatory wrongful death" by harassment that until now has never been adopted by the Michigan courts—as confirmed by the lower courts' reliance on that argument as a basis for sustaining the gigantic verdict. Such damages are simply unavailable under Elliott-Larsen, and a verdict based on such an improper claim cannot stand.

The proper remedy is a new trial on all issues. *See Wells v. Dallas Indep. Sch. Dist.*, 793 F.2d 679, 683-84 (5th Cir. 1988) ("when an award is 'so exaggerated as to indicate bias, passion and prejudice, corruption, or other improper motive,' remittitur is inadequate and the only proper

remedy is a new trial" (citation omitted)). In the alternative, DaimlerChrysler is entitled to a drastic remittitur.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and judgment notwithstanding the verdict should be entered in favor of DaimlerChrysler. In the alternative, a new trial, before a different Circuit Court judge, should be ordered on all issues. At a minimum, DaimlerChrysler is entitled to a substantial remittitur.

Respectfully submitted,

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